(23,203 and 23,204)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 642.

THE CITY AND COUNTY OF DENVER ET AL., PETITIONERS,

vs.

THE NEW YORK TRUST COMPANY ET AL.

No. 643.

THE CITY AND COUNTY OF DENVER ET AL., PETITIONERS,

vs.

THE DENVER UNION WATER COMPANY ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

INDEX.

	Original.	Print
Caption	*a*	1
Transcript from the circuit court of the United States for the district of Colorado	*b*	1
Caption	*b*	1
Bill of complaint of The New York Trust Company	1	2
Exhibit A—Ordinance No. 44 of the city of Denver, April 10, 1890	57	31
Schedule A—Schedule of water rates	73	39
B—Mortgage, The Denver Union Water Company to Continental Trust Company of New York, trustee, October 20, 1894	79	42

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 12, 1912.

	Original.	Print
Exhibit C—Ordinance No. 163 of the city and county of Denver, October 2, 1907	131	69
D—Charter amendment, section 264*a*	150	79
E—Ordinance No. 98 of the city and county of Denver, July 6, 1910	157	82
Subpœna and marshal's returns	166	86
Order setting for hearing complainant's motion for injunction	168	88
Answer of The Denver Union Water Company to bill of complaint of The New York Trust Company	169	89
Order granting leave to The Denver Union Water Company to file cross-bill	212	111
Cross-bill of The Denver Union Water Company	213	111
Exhibit A—Ordinance No. 44 of the city of Denver, April 10, 1890	279	146
Schedule A—Schedule of water rates	295	154
B—Ordinance No. 163 of the city and county of Denver, October 2, 1907	301	157
C—Charter amendment, section 264*a*	320	167
D—Ordinance No. 98 of the city and county of Denver, July 6, 1910	327	170
Order for service of subpœna on cross-bill upon counsel for The New York Trust Company	336	175
Subpœna on cross-bill and marshal's returns	337	176
Order fixing time for hearing upon motion of cross-complainant for injunction	339	178
Record entry of appearance of the City and County of Denver *et al.* to bill of complaint	340	178
Record entry of hearing upon motions for injunctions, August 31, 1910	340	179
Affidavits for The Denver Union Water Company	341	179
Affidavit of William P. Robinson	341	180
Exhibit A—Minutes of meetings of city council	355	191
At meeting of November 7, 1870	355	191
December 1, 1870	355	192
December 8, 1870	356	192
B—Minutes of meetings of city council	360	196
At meeting of January 10, 1872	360	196
January 19, 1872	360	196
January 22, 1872	361	197
February 1, 1872	362	198
February 2, 1872	363	199
February 5, 1872	365	200
February 6, 1872	365	200
April 13, 1874	368	203
April 16, 1874	368	203
April 23, 1874	369	204
April 30, 1874	369	204
May 7, 1874	372	206
May 8, 1874	372	206
C—Advertised copy of ordinance No. 54 of city of Denver, December 15, 1894	375	210
D—Letter, C. S. Thomas to R. W. Speer, mayor, March 3, 1908	379	213

	Original.	Print
Exhibit E—Report of public utilities commission of city and county of Denver, August 20, 1910	385	216
Affidavit of David H. Moffat	386	231
Affidavit of David G. Thomas	388	233
Map showing boundaries of city of Denver proper and the boundaries of each of the former separate municipal corporations which became a part of the city of Denver, etc	391	235
Affidavit of Alfred Kerns	392	236
Record entry of hearing upon applications for injunction, September 1, 1910	397	240
Record entry of hearing upon applications for injunction, September 2, 1910	397	240
Record entry of hearing upon applications for injunction, September 3, 1910	398	241
Order of submission of applications for injunction	398	241
Certified copy of proposed amendment, section 264*a*, to charter of city and county of Denver	399	242
Affidavits for Armour C. Anderson *et al.*	404	246
Affidavit of Edwin Van Cise	404	246
Affidavit of Charles S Thomas	415	255
Report of M. L. Holman to finance committees of board of aldermen, etc., June 28, 1909	416	256
Affidavit of E. B. Thrush	421	261
List of permits issued to The Denver Union Water Co. to make excavations	422	262
Certificate of B. F. Davis, city clerk, as to statement of ordinances passed for extension of mains, etc	422	262
List of ordinances passed for extension of mains	423	263
Affidavit of Armour C. Anderson	425	265
Ellis Meredith	427	267
Matthew F. Murray	428	268
Proposed franchise to The Denver Union Water Co. submitted to electors	431	269
Order granting injunction to The New York Trust Company, September 6, 1910	432	270
Order granting injunction to The Denver Union Water Co., September 6, 1910	435	272
Statement of documentary evidence offered by defendants upon applications for injunction	436	274
Statement as to record in supreme court of Colorado in case of The Denver Water Co. *vs.* Citizens Water Co., etc	436	274
Circular letter of The Denver Union Water Co. to citizens and taxpayers of Denver, March 21, 1910	449	283
Order granting leave to complainant to file supplemental bill of complaint	450	284
Supplemental bill of complaint of The New York Trust Company	451	284
Acknowledgment of receipt of copy of supplemental cross-bill of The Denver Union Water Co. and consent to filing of same	459	288
Supplemental cross-bill of The Denver Union Water Co.	460	289

	Original.	Print
Notice to The New York Trust Co. of application for appeal from order granting injunction upon bill of complaint	464	292
Notice to The Denver Union Water Co. *et al.* of application for appeal from order granting injunction upon bill of complaint.	466	294
Petition for appeal from order granting injunction upon bill of complaint	467	295
Assignment of errors upon appeal from order granting injunction upon bill of complaint	469	297
Order granting appeal from order granting injunction upon bill of complaint	472	299
Bond on appeal	473	300
Notice to The Denver Union Water Co. of application for appeal from order granting injunction upon cross-bill	475	302
Notice to The New York Trust Co. of application for appeal from order granting injunction upon cross-bill	477	304
Petition for appeal from order granting injunction upon the cross-bill	479	306
Assignment of errors upon appeal from order granting injunction upon the cross-bill	481	308
Order granting appeal from order granting injunction upon cross-bill	485	311
Bond on appeal from order granting injunction upon cross-bill	486	312
Præcipe for transcript	488	314
Citation on appeal from order granting injunction upon the bill of complaint	489	315
Citation on appeal from order granting injunction upon the cross-bill	490	316
Clerk's certificate to transcript	491	317
Opinion of the court	492	318
Clerk's certificate to copy of opinion	505	328
Stipulation as to record and hearing of cases	507	329
Appearance of Mr. Henry A. Lindsley and Mr George Q. Richmond for appellants in cause No. 3479	509	330
Appearance of Mr. A. M. Stevenson for appellees in cause No. 3479.	509	331
Appearance of Mr. Gerald Hughes for appellees in cause No. 3479.	510	331
Appearance of Messrs. Vaile, McAllister & Vaile for appellee, The New York Trust Co., in cause No. 3479	511	332
Appearance of Mr. Clayton C. Dorsey and Mr. William V. Hodges for appellee, The Denver Union Water Co., in cause No. 3479	511	333
Appearance of Mr. Charles W. Waterman for appellants in cause No. 3479	512	333
Appearance of Messrs. Thomas, Bryant, Nye & Malburn for appellants in cause No. 3479	513	334
Order of argument in cause No. 3479	513	334
Order of submission in cause No. 3479	514	335
Opinion in causes Nos. 3479 and 3480	515	335
Decree in cause No. 3479	528	347
Petition for a rehearing in causes Nos. 3479 and 3480	530	349
Order denying petition of appellants for a rehearing in cause No. 3479	552	360
Appearance of Messrs. Thomas, Bryant, Nye & Malburn for appellants in cause No. 3480	553	360

	Original.	Print
Appearance of Messrs. Vaile, McAllister & Vaile for appellee, The New York Trust Co., in cause No. 3480	553	361
Appearance of Mr. A. M. Stevenson for certain appellees in cause No. 3480	554	361
Appearance of Mr. Gerald Hughes for certain appellees in cause No. 3480	555	362
Appearance of Mr. Henry A. Lindsley and Mr. George Q. Richmond for appellants in cause No. 3480	555	362
Appearance of Mr. C. C. Dorsey and Mr. W. V. Hodges for appellee, Denver Union Water Co., in cause No. 3480	556	363
Appearance of Mr. Charles W. Waterman for appellants in cause No. 3480	557	363
Order of argument in cause No. 3480	557	363
Order of submission in cause No. 3480	558	364
Memorandum as to opinion	558	364
Decree in cause No. 3480	559	365
Memorandum as to petition of appellant for a rehearing in cause No. 3480	560	366
Order denying petition of appellant for a rehearing in cause No. 3480	561	366
Clerk's certificate to transcript	562	366
Stipulation as to return to writ of certiorari in No. 3479	563	367
Writ of certiorari in No. 3479	564	368
Return to writ of certiorari in No. 3479	566	368
Stipulation as to return to writ of certiorari in No. 3480	568	369
Writ of certiorari in No. 3480	569	370
Return to writ of certiorari in No. 3480	571	370

a Pleas and Proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the May Term, A. D. 1911, of said Court, Before the Honorable William C. Hook, Circuit Judge, and the Honorable John A. Riner and the Honorable Henry T. Reed, District Judges.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to-wit: on the twenty-fourth day of September, A. D. 1910, a transcript of record, pursuant to appeals allowed by the Circuit Court of the United States for the District of Colorado, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in certain causes wherein The City and County of Denver, a municipal corporation, et al., are Appellants, and The New York Trust Company, a corporation, et al., are Appellees, and wherein The City and County of Denver, a municipal corporation, et al., are Appellants, and The Denver Union Water Company, a corporation, et al., are Appellees, which said transcript of record is in the words and figures following, to-wit:

b In the Circuit Court of the United States for the District of Colorado.

No. 5572.

THE NEW YORK TRUST COMPANY, Complainant,
versus
THE CITY AND COUNTY OF DENVER et al., Respondents.

Volume 1.

Pleas in the Circuit Court of the United States for the District of Colorado, Sitting at Denver.

Be It Remembered, that heretofore, and on, to-wit, the twenty-second day of August, A. D. 1910, came The New York Trust Company by Joel F. Vaile, Esquire, Henry McAllister, Junior, Esquire, and William N. Vaile, Esquire, its solicitors, and filed in said court its bill of complaint, and sued out of and under the seal of said court a subpœna in chancery against the City and County of Denver, Robert W. Speer, as mayor of the city and county of Denver, Burt F. Davis as clerk of said City and county of Denver, Albion K.

Vickery, as auditor of said city and county of Denver, Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows, as members of and constituting the Public Utilities Commission of said city and county of Denver; Ellis Meredith, A. E. Mauff, and Harry Petrie, as members of and constituting the Election Commission of said city and county of Denver, The Denver Union Water Company and The South Platte Canal and Reservoir Company.

And the said bill of complaint is in words and figures as follows, to-wit:

1 In the Circuit Court of the United States within and for the District of Colorado.

In Equity. No. 5572.

THE NEW YORK TRUST COMPANY, a Corporation, Complainant,
vs.
THE CITY AND COUNTY OF DENVER, a Municipal Corporation; Robert W. Speer, as Mayor of the City and County of Denver; Burt F. Davis, as Clerk of said City and County of Denver; Albion K. Vickery, as Auditor of said City and County of Denver; Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows, as Members of and Constituting the Public Utilities Commission of said City and County of Denver; Ellis Meredith, A. E. Mauff and Harry Petrie, as Members of and Constituting the Election Commission of said City and County of Denver; The Denver Union Water Company, a Corporation, and The South Platte Canal and Reservoir Company, a Corporation, Defendants.

Bill of Complaint.

To the Honorable Judges of the Circuit Court of the United States for the District of Colorado, in Equity Sitting:

The New York Trust Company, a corporation of the state of New York and a citizen and resident of said state of New York, as
2 trustee of the express trusts hereinafter mentioned, brings this, its bill of complaint, against the above named defendants, The City and County of Denver, a municipal corporation; Robert W. Speer, as mayor of said City and County of Denver; Burt F. Davis, as clerk of said City and County of Denver; Albion K. Vickery, as auditor of said City and County of Denver; Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows, as members of and constituting the Public Utilities commission of said City and County of Denver; Ellis Meredith, A. E. Mauff and Harry Petrie, as members of and constituting the Election Commission of said City and County of Denver; The Denver Union Water Company, a corporation; and The South Platte Canal and Reservoir Company, a corporation; all of said defendants being citizens and residents of the state of Colorado.

And thereupon your orator complains and says:

First. Your orator is, at the time of the creation of the express

trusts hereinafter mentioned was, and ever since has been and now is a corporation duly created, organized and existing under and by virtue of the laws of the state of New York, with its principal office in the borough of Manhattan in said state, and at all of said times was, and now is, a citizen and resident of the State of New York, and as such corporation, was and is empowered under the laws of the state of New York and the state of Colorado to take and hold the properties conveyed to it in trust as hereinafter stated, and to accept and execute the trust reposed in it under and by virtue of the deed of trust hereinafter mentioned and described.

3 Second. The defendants, the said City and County of Denver, a municipal corporation; Robert W. Speer, as mayor of said City and County of Denver; Burt F. Davis, as clerk of said City and County of Denver; Albion K. Vickery, as auditor of said City and County of Denver; Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows, as members of and constituting the Public Utilities commission of said City and County of Denver; Ellis Meredith, A. E. Mauff and Harry Petrie, as members of and constituting the Election Commission of said City and County of Denver; The Denver Union Water Company, a corporation; and The South Platte Canal and Reservoir Company, a corporation; and each of them, were at all times with reference to which they are herein mentioned, and now are, citizens and residents of the state of Colorado.

Third. The City and County of Denver (hereinafter for brevity sometimes called the defendant city) is a municipal corporation located and existing in the state of Colorado under and by virtue of article XX of the Constitution of the state of Colorado; Robert W. Speer is the duly elected, qualified and acting mayor of said City and County of Denver; Burt F. Davis is the duly elected, qualified and acting clerk of said City and County of Denver; Albion K. Vickery is the duly elected, qualified and acting auditor of the said City and County of Denver; Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows are the elected, qualified and acting members of the Public Utilities Commission of said City and County of Denver; Ellis Meredith, A. E. Mauff and Harry Petrie are

4 the duly elected, qualified and acting members of the Election commission of said city and county of Denver; The Denver Union Water Company (hereinafter for brevity sometimes called the defendant water company, or the water company) was duly created and organized on the 18th day of October, 1894, as a corporation under and by virtue of the laws of the state of Colorado, and ever since has been and now is duly organized and existing and doing business under and by virtue of the laws of the state of Colorado; The South Platte Canal and Reservoir Company (hereinafter for brevity sometimes called The South Platte Company) is now, and at all of the times with reference to which it is hereinafter mentioned, was, a corporation duly organized and existing under and by virtue of the laws of the state of Colorado.

Fourth. The amount involved in this controversy exceeds, exclusive of interest and costs, the sum or value of five thousand dollars, and this is a controversy wholly between citizens of different states,

to wit: between your orator, a citizen and resident of the state of New York, on the one hand, and all of the defendants herein, all of whom are citizens and residents of the state of Colorado, on the other hand; and this is a suit of a civil nature in equity, arising under the Constitution and laws of the United States, to wit: those provisions of the Constitution of the United States and the amendmens thereto hereinafter specifically mentioned and referred to.

Fifth. Prior to the 18th day of October, 1894, there was embraced within the territory now constituting the City and County of Denver, the City of Denver, a municipal corporation organized and existing under and by virtue of a special charter granted by
5 the legislature of the state of Colorado; and the towns of Barnum, Colfax, Harman, Highlands, South Denver, Argo, Berkeley, Elyria, Globeville, Montclair and Valverde, each of which was a municipal corporation duly organized and existing under and by virtue of the laws of the state of Colorado.

Since the year 1870 and until the 18th day of October, 1894, numerous corporations had been organized for the purpose of supplying water to the various municipalities now constituting the city and county of Denver, and had been engaged in supplying said municipalities and the inhabitants thereof with water; such corporations being The Denver City Water Company, The Denver City Irrigation and Water Company, The Denver Water Company, The Domestic Water Company, The Denver City Water Works Company, The American Water Works Company of New Jersey, The Mountain Water Company, The Beaver Brook Water Company and The Citizens Water Company. Prior to said October 18, 1894, there had been granted by said several municipalities to said various companies, under and in pursuance of the powers vested in said municipalities by law and in full conformity with such law, ordinances and contracts for the supply of water to said several municipalities and the inhabitants thereof, many of which ordinances and contracts were on said October 18, 1894, and still are, in full force and effect. Among said ordinances so passed and enacted, and said contracts duly made and entered into, was Ordinance No. 44 of the series of 1890, of the ordinances of the city of Denver, which ordinance was duly passed and approved as provided by law and became
6 effective on the 10th day of April, 1890. A true copy of said Ordinance No. 44 of the series of 1890 is attached to this bill, marked "Exhibit A" and hereby referred to. In and by said ordinance, as appears by the terms thereof, there was granted to The Denver Water Company, a corporation organized and existing under the laws of the state of Colorado, and to its successors and assigns, certain rights and privileges as therein specified and hereinafter more fully referred to, and in and by said ordinance a certain contract was made and entered into by and between the city of Denver and said The Denver Water Company, and the successors and assigns of each of said parties, all as will more fully appear from the said ordinance, and hereinafter in this bill of complaint.

On the 18th day of October, 1894, and for several years prior thereto, all of the property of the aforesaid water companies of every

description, including their franchises and contracts from the several municipalities above alleged, had been acquired by The American Water Works Company, a New Jersey corporation, and The Citizens Water Company, respectively, and these two corporations were during said period and at said date the only companies engaged in the supplying of water to the various municipalities above named and their inhabitants, and were the owners, respectively, of all the property and plants used for such purposes.

Between the 18th day of October, 1894, and the 20th day of October, 1894, the defendant, The Denver Union Water Company, acquired by purchase from The Citizens Water Company and the legal successors in interest of The American Water Works Com-
7 pany of New Jersey, all of the property and plant used for the distribution of water now comprised in the city and county of Denver, including all of the franchises and contracts belonging to said two companies and their predecessor companies as above alleged. Among the said contracts, rights and privileges so acquired by the defendant water company was the said Ordinance No. 44 of the series of 1890, and all of the rights, privileges, franchises and contracts therein contained and thereby created, and thereupon the defendant water company became the assignee and grantee of The Denver Water Company with respect to said Ordinance No. 44 of the series of 1890, and all of the grants, privileges and contracts therein contained.

Sixth. On, to wit, the 20th day of October, 1894, the defendant water company, having become the owner of all of said property as hereinabove described, including said Ordinance No. 44 of the series of 1890, did, being thereunto duly authorized, make, execute and deliver to the Continental Trust Company of the city of New York (which was then a corporation organized and existing under and by virtue of the laws of the state of New York), trustee, its certain mortgage or deed of trust to secure its authorized issue of bonds to the amount of eight million dollars ($8,000,000), bearing date October 20th, 1894, and due and payable July 1, 1914, bearing interest at the rate of five per cent. per annum from July 1, 1894, payable semi-annually, which said mortgage or deed of trust and all of the trusts evidenced thereby were duly accepted by the Continental Trust Company of the city of New York, as aforesaid, on, to wit,
8 the 26th day of October, 1894, and such mortgage or deed of trust was filed for record in the office of the clerk and recorder of the then county of Arapahoe, now city and county of Denver, and duly recorded in the records of said office on the first day of November, 1894, in book 1023, at page 28. All of the said bonds of the defendant water company secured by said trust deed or mortgage, and aggregating eight million dollars in amount, were actually issued, sold and negotiated, and the proceeds thereof used in the acquisition, construction and extension of said water works plant, and the same are now, and for many years last past have been, outstanding in the hands of purchasers thereof for value and in good faith. A true copy of said mortgage or deed of trust, marked "Exhibit B," is attached to this bill of complaint and made a part hereof,

and such mortgage or deed of trust has ever since the execution and delivery thereof been, and now is, in full force and effect as security for the payment of the aforesaid issue of bonds.

After the execution and delivery of said mortgage or deed of trust and the acceptance of the trusts therein contained and set forth, the said Continental Trust Company of the City of New York was merged under the laws of the state of New York with the New York Security and Trust Company, a corporation organized under the laws of the state of New York, and the said New York Security and Trust Company became the successor of the said Continental Trust Company of the City of New York, in respect to the trusts contained in said mortgage or deed of trust, and was authorized and obligated to carry out, perform and observe all of the terms and conditions of said mortgage or deed of trust resting upon the trustee therein named; that thereafter the said New York Security and Trust Company, in conformity with the laws of the state of New York, changed its name and became, and is now known as The New York Trust Company, your orator herein, by which name it is now the trustee in said mortgage or deed of trust, and the successor in respect of said trusts to the said Continental Trust Company of the City of New York.

In and by said mortgage or deed of trust, the defendant Water Company for the uses and purposes therein described, and to secure the payment of the principal and interest of said bonds, granted, bargained, sold, released, remised, enfeoffed, conveyed and confirmed unto the Continental Trust Company of the City of New York, its successors and assigns, all its privileges, franchises, easements, choses in action, estate, property (real and personal), waterworks, pipes, mains, valves, hydrants and other apparatus, and all extensions and enlargements thereof, improvements thereto, and all tools, implements, effects and assets, and all rentals, debts, dues, demands and choses in action, of every kind and nature, including water rents, in and by virtue of any contract or contracts, resolution or resolutions, ordinance or ordinances of said the City of Denver, or any of said municipal corporations hereinabove mentioned, then in force or which might be thereafter in force, or in or by virtue of any contract, resolution or ordinance between said city and all or either of said towns, or any town, or between said company, its successors or assigns, and any other town or city, which might then or at any time thereafter inure to the benefit of said The Denver Union Water Company or its assigns, and the water rents of any consumers, wheresoever situated, and all water rents of any kind whatsoever, and also all the estate, privileges, franchises, easements, choses in action, property (real and personal), effects and assets which said The Denver Union Water Company, its successors and assigns, might at any time thereafter during the existence of said instrument, and the lien thereof, acquire at any place whatsoever for any purpose for which the said corporation, its successors or assigns, should be authorized by its articles of incorporation or charter to own, have, possess or acquire. And for a further assurance it was further provided in said mortgage or deed of trust that

all rights of action under said indenture should be vested exclusively in the Continental Trust Company of the City of New York, and its successor or successors, as such trustee; all as will more fully appear from the copy of said mortgage or deed of trust hereunto annexed. And in and by said mortgage or deed of trust your orator has an estate in, and a lien upon all property, real, personal and mixed, of the defendant Water Company, and all of its rights, franchises, privileges and contracts, including all rights, privileges and contracts granted and entered into by and under the aforesaid Ordinance No. 44, of the series of 1890, and all of the revenues of the defendant Water Company, to secure and insure the payment of all of said bonds and the interest thereon.

Seventh. Ever since the date of the execution and delivery of said mortgage or deed of trust, on October 20, 1894, the defendant Water Company has been and now is the owner, subject to the right, title and interest of your orator under such mortgage or deed of trust, and in possession and control and operating all of the
11 water plant, storage and distributing system and water rights, and all of the franchises, contracts, and choses in action of every nature and kind whatsoever, formerly belonging to said predecessor Companies, including the rights, privileges and contracts created and granted by said Ordinance No. 44 of the series of 1890; all of which were at all of said times, and now are, used and necessary to be used for the supply of water to the City and County of Denver and its predecessor municipalities, and to the territory embraced therein and all the inhabitants thereof. Such water works system of the defendant water company and your orator has at all of said times been and now is the sole means and source of supply of water for any and all purposes to said predecessor municipalities, and to the defendant City, to all the territory embraced therein and all of its inhabitants. Said water and the supply thereof through said water works system and the constant, uninterrupted furnishing of said supply in an amount adequate to the reasonable needs of all consumers of water, and the maintenance of said water works system, and the constant improvement and enlargement thereof to convey and distribute said water as and when the same may be needed for all purposes in said territory, are all essential and indispensable to the protection and welfare of all inhabitants of said territory, in respect of life, health and the security of property, as well as comfort and convenience. Since October 20, 1894, the population of the territory now embraced in the City and County of Denver has largely increased, having practically doubled, now amounting to more than two hundred thousand and rapidly growing; and in order to furnish an adequate supply
12 of water for all purposes to said territory and the inhabitants thereof, and to provide for the future growth in population and the increased needs incident thereto, it has been necessary to expend, and the defendant Water Company has expended, since the execution and delivery of said mortgage or deed of trust, very large sums of money, to wit, more than five million dollars in the acquisition of additional property and in the enlargement and ex-

tension of its old works, all of which were and are essential for the purposes aforesaid, and constitute a necessary portion of said water works system; and further expenditures will be necessary from time to time in the future, to keep pace with the growth in population of the defendant City.

The City and County of Denver is located in an arid or semi-arid region near the eastern base of the Rocky mountains, where the water supply for all purposes, domestic, irrigation and power, is obtainable only from the mountain streams which flow eastward on to the prairies, and the supply of water furnished by said streams and available for use in the City and County of Denver is extremely limited in quantity, and the uses and demands therefor unlimited and increasing from year to year. For these reasons water is a commodity having an ascertained value, and daily increasing in value as the uses are increased, and it is, and for many years has been necessary that the needs of the defendant city for water should be anticipated, and that such water supply should be at least twenty years in advance of the actual present need, and unless such water was so acquired, held and used, not only would the future growth of the defendant city be impeded, but its present welfare and
13 safety seriously affected. At certain periods of each year all of the natural flow of the streams supplying water to the defendant city is not sufficient to supply more than one-half of the actual daily consumption, and therefore it is and has been essential, in order to supply the defendant city and its inhabitants with water, and to protect their health and safety, that large reservoirs should be built and maintained on the headwaters of said streams above Denver; all of which has heretofore been done by the Defendant Water Company and cannot now be duplicated upon said streams. Among other things, the defendant Water Company heretofore caused to be incorporated the defendant, The South Platte Canal and Reservoir Company, and all of the capital stock of the said South Platte Company ever since has been and now is owned by the defendant The Denver Union Water Company. Said South Platte Company, acting under the control of the defendant Water Company, by the expenditure of large sums of money obtained and furnished by the defendant Water Company, heretofore constructed a dam and created a reservoir known and designated as the Cheesman dam and lake, on the South fork of the South Platte river, and which was constructed and has been and is used and necessary to be used as a storage reservoir to impound and store water for the supply of the defendant city and its inhabitants, through the water works system of the defendant Water Company, which reservoir has a capacity of 25,761,407,322 gallons, and now contains substantially 24,790,897,609 gallons of water, being a sufficient amount to supply the defendant city with its present population for a long time to come, without any
14 replenishment from any source. The South Platte Company, under the direction and control of the defendant Water Company, also acquired and owns a large amount of other property, including water rights, filter beds, filtration plants and other like holdings, all of which were so acquired as, and are, an essential part of

the said water works system, and are used and necessary to be used for the water supply of the defendant city and its inhabitants. In order to obtain the funds required for the construction and acquisition of said Cheesman dam and lake, and the other property and facilities above mentioned, and water rights appurtenant thereto, the South Platte Company authorized an issue of its bonds in the aggregate sum of four million dollars, bearing interest at the rate of five per cent. per annum from the date thereof, and running for the period of twenty years from their date, to wit, July 1, 1903, and to secure the payment thereof, made, executed and delivered to, a trustee, its deed of trust or mortgage on all of its property, real and personal, rights and franchises, then acquired and thereafter to be acquired by said South Platte Company, and the defendant Water Company agreed to and did guarantee the payment of both principal and interest of each of said bonds. Said entire issue of bonds have heretofore been issued and sold, and in good faith purchased, and are now outstanding in the hands of purchasers, for value. By the express terms of said bonds, and the mortgage or deed of trust securing the same, the said bonds are redeemable at the option of the South Platte Company at any time during the year beginning April 10, 1910, and ending April 9, 1911, at the price of 105 per cent. of the par value thereof and accrued interest thereon, and upon the payment and redemption of said bonds, the trust deed or mortgage now securing the same will be and become discharged, cancelled and of no effect.

On the 1st day of May, 1903, the South Platte Company made and entered into an agreement of lease with the defendant Water Company, wherein and whereby it leased, let and demised unto said Water Company, for the period of twenty years from and after July 1, 1903, all of its property, rights, water rights, reservoirs, pipe lines, settling basins, filters and all other property of every kind then owned or thereafter acquired by the South Platte Company, with the right in said defendant Water Company, lessee, to use and operate the same, and with the exclusive right to the use of all waters impounded or to be impounded in said Lake Cheesman, or any other reservoir, by the South Platte Company; and ever since said date the defendant Water Company has been, and now is, in full possession, control and use of all of said property, and the same is used and is necessary to be used as, and constitutes, an essential and integral part of the said water works system of the defendant Water Company.

Eighth. The defendant City and County of Denver is the successor to the City of Denver and to the several other municipalities named in paragraph numbered "fifth" of this bill of complaint, all of which formerly existed within the present territorial limits of the defendant City and County of Denver. By virtue of Article XX of the Constitution of the State of Colorado, and the various statutory and legal proceedings under which the defendant City was organized, it succeeded to all the rights and liabilities, and assumed all of the obligations, of the former City of Denver and such other included municipalities, and is bound by and in equity and good conscience obligated to observe,

carry out, perform and faithfully fulfill every and all of the conditions and stipulations of the several ordinances, contracts and agreements of its said predecessors, including said Ordinance No. 44 of the Series of 1890; and the bonds issued by the defendant Water Company as aforesaid and secured by the mortgage or deed of trust in which your orator is trustee, as well as the bonds issued by the defendant South Platte Company as aforesaid, were sold by said Companies and acquired and paid for by the purchasers thereof, and each of them, in the full belief and understanding, and in reliance thereon, that said contract obligations of the defendant City and its said predecessors would be fully and faithfully performed, fulfilled, carried out and observed by it and by them.

Ninth. As above stated, among such ordinances and contracts so granted and entered into, was the said Ordinance No. 44 of the Series of 1890, between the City of Denver, to whose rights, contracts and obligations thereunder the defendant City has succeeded, on the one hand, and The Denver Water Company, to whose rights, privileges, contracts and obligations thereunder the defendant Water Company has succeeded, on the other hand. This Ordinance No. 44 of the Series of 1890 at all times did, and now does, constitute the contract between the defendant Water Company and the defendant City with reference to the supply of water for all purposes to the major portion of the territory included within the limits of the City and County of Denver, and to the very great majority of the inhabitants of said entire territory, and like-
17 wise the contract with reference to the acquisition by the defendant City of the water works and plant of the defendant Water Company. Said ordinance and contract was the principal inducement to the acquisition by the defendant Water Company of the said water plant and its enlargement and improvement, and the investment of the very large sums of money necessary for that purpose, as above stated; and such ordinance and contract also constituted, and now constitutes in very large measure, the security upon the faith of which the aforesaid bonds of the defendants Water Company and South Platte Company were issued and sold and the moneys of the purchasers thereof invested therein; and unless the terms and provisions of said ordinance and contract, and all thereof, shall be faithfully observed and fully carried out by the defendant City, the security of the bondholders for whom your orator is trustee under said deed of trust will be very greatly impaired and such bondholders subjected to great loss and damage.

In and by said Ordinance No. 44 of the series of 1890 there was granted to The Denver Water Company, to which the defendant Water Company is successor, and to the successors and assigns of said The Denver Water Company, the right and privilege of laying down, continuing and maintaining water pipes, valves, hydrants and apparatus for the conveyance and distribution of water in, upon, along and through the streets, avenues, alleys and public places of the city of Denver and additions thereto, as therein described, subject to termination in the manner in said ordinance thereafter specified. Said ordinance fixed no date for the
18 termination of the rights and privileges therein and thereby granted, or of the contract thereby entered into, nor was any

means, method or manner specified for the termination of the same, or any thereof, except as follows, to wit:

"SEC. 11. At the expiration of the period of twenty years from and after the date of the passage and approval of the ordinance, in case the city shall then elect so to do, the said works may be purchased by the said city, and in case the parties cannot agree, after such election, upon the price to be paid by the city for the water works of the said company, its successors and assigns, then their fair cash value shall be determined by arbitration, by five disinterested persons, none of whom shall be residents of Denver, two of them to be chosen by the city, two by the company, and the fifth by the four first chosen, and in case of failure on the part of the company to name arbitrators for the period of thirty days after the city shall have named arbitrators and notified the company so to do, the city may apply to any court having equity jurisdiction in the county in which the city of Denver shall then be situated for the appointment of two persons of the qualifications aforesaid as such arbitrators, and the court may thereupon appoint two such persons, who shall act with the same force and effect as if appointed by the company, and the decision of a majority of said board shall be final and binding upon both parties, and upon the payment, or tender of payment, by said city the said company shall convey to said city all of its property, real or personal, easements, rights and privileges, and thereafter all franchises, rights and privileges which have been at any time theretofore granted said company, its successors or assigns, and which it may then possess, shall cease and be at an end.

"SEC. 12. At the expiration of the said period of twenty years the said city may, at its election, renew the contract hereby made, by ordinance to that effect, for a like period of twenty years, but at a price for hydrant rental 10 per cent. less than mentioned in section 10 hereof, for the period remaining after the ten years after May 1st, 1891, and for successive periods of twenty years at the price last aforesaid, as often and as long as the city may choose. This section is conditioned, however, upon the full performance by the city of the provisions of section 2 hereof.

* * * * * * *

"SEC. 20. All mains, pipes, valves and other apparatus now owned by said The Denver Water Company, and composing its plant, and all such mains, pipes, valves, hydrants and other apparatus as said The Denver Water Company, its successors or assigns, shall hereafter lay down or set in or upon any of the streets, alleys or other public places within said city shall be and remain the sole and absolute property of said The Denver Water Company, its successors and assigns, and the said The Denver Water Company, its successors or assigns, shall forever be considered and entitled to be in possession thereof, except in case of purchase by said city under the terms of this ordinance, or some agreement between said city and said company, its successors or assigns, when all rights of whatsoever nature of said company, its successors or assigns, in and to the subject-matter hereof shall vest in said city."

The Denver Water Company and its successor and assignee, the defendant water company, have at all times and in all particulars up to the present time, complied with and observed, and the defendant water company is now complying with, and observing in each and every respect, all the terms and provisions of said contract.

All of the property, franchises and rights of the other corporations hereinabove named have been purchased by the defendant water company and added to the former plant of The Denver Water Company, and the aforesaid additions and enlargements thereunto have been made, and such acquisition and construction of new property, rights and facilities, including those provided through the defendant South Platte Company, have been accomplished, all for the purpose of supplementing, amplifying and perfecting the water works and plant formerly belonging to said The Denver
21 Water Company, in order that the same may be proper and sufficient to furnish an adequate supply of water to the defendant city and its inhabitants, and to fully comply with the terms and conditions of said contract. All of the said reservoirs, settling basins, filter beds, filtration plants, conduits, distributing and pressure reservoirs, mains, pipes, and distributing system and other portions of said water system, whether standing in the name of the defendant water company or the defendant South Platte Company, and owned by them respectively, are interconnected and dependent one upon the other, and all of the same are essential, inseparable and integral portions of one and the same water works system or plant, and all of them together constitute and are the water works and property referred to and contemplated to be purchased by the city under and by virtue of the terms of said section 11 of Ordinance No. 44 of the series of 1890.

Tenth. Heretofore and shortly prior to the second day of October, 1907, the defendant water company, at the instance and request of the defendant city, agreed to waive, and so far as it was empowered so to do, did waive the provision contained in said section 11 of Ordinance No. 44 of the series of 1890, to the effect that the defendant city, as successor to the city of Denver, could not exercise its option to purchase said water works and plant, or cause an appraisement thereof to be made for that purpose until the expiration of the period of twenty years from and after April 10th, 1890. Thereupon, at the instance of the City and County of Denver, and with the consent of the defendant water company, there was duly
22 enacted, approved and published, an ordinance of said city and county of Denver, designated as Ordinance No. 163 of the series of 1907, approved the second day of October, 1907, which ordinance ever since has been and now is in full force and effect, so far as in law it may be effective, in view of the contract relations then and theretofore existing between the defendant city, the defendant water company and your orator as trustee in said deed of trust or mortgage as aforesaid, and the holders of the bonds secured thereby; a true copy of which ordinance, marked "Exhibit C," is attached to this bill, hereby referred to and made a part hereof.

In and by said ordinance it was contemplated and provided that a contract, in form and substance as set forth therein, should forth-

with be entered into between said City and County of Denver and The Denver Union Water Company in substance and to the effect that the defendant City should be and was granted the privilege of causing the appraisement contemplated by Section 11 of Ordinance No. 44 of the Series of 1890 to be made forthwith and at a date prior to the expiration of the period of twenty years in said Ordinance No. 44 specified, and that the defendant City should and did then and there and thereby elect to purchase the said water works system and plant at the appraised price, unless it should grant to the defendant Water Company, its successors and assigns, a new franchise, differing in its terms from said Ordinance No. 44 of the Series of 1890, all as contemplated by and set forth in said Ordinance No. 163 of the Series of 1907. And said ordinance and the contract to be made thereunder as aforesaid further pro-

23 vided that under and in accordance with and in the manner specified by Section 11 of said Ordinance No. 44 of the Series of 1890, five appraisers or arbitrators should forthwith be selected and appointed, and that such appraisers or arbitrators, after first qualifying as such, should thereupon proceed to appraise the said water system and plant and to make their findings as to the fair cash value thereof, all as more fully specified in said section 11 of Ordinance No. 44 of the series of 1890, and in said Ordinance No. 163 of the Series of 1907, and that such appraised value should be binding and conclusive upon the said city and said company.

Thereafter and within ten days after the passage and publication of said ordinance the defendant City and the defendant Water Company did make and enter into the contract in form and substance as set forth in said Ordinance No. 163 of the Series of 1907, and to the effect above stated, all as contemplated by and provided in said ordinance.

Shortly after the passage and approval of said Ordinance No 163 of the Series of 1907, and the execution and delivery, in pursuance thereof, of the said contract between the defendant City and the defendant Water Company, and in the manner and mode specified in Section 11 of said Ordinance No. 44 of the Series of 1890, and in full compliance with the terms thereof in all particulars except as to the date of said procedure, five appraisers or arbitrators were duly appointed. All of such appraisers or arbitrators were non-residents of the City and County of Denver, wholly disinterested and impartial, and in the highest degree qualified by train-

ing and experience to perform the duties imposed upon them

24 in connection with said appraisement. The appraisers selected by the defendant Water Company were John R. Freeman, of Providence, Rhode Island, and C. L. Harrison, of New York City. Prior to the selection of the appraisers for the defendant City, the Mayor of said City submitted to the various commercial bodies of said City a list of names, stating to each of said commercial bodies that the City and County of Denver had practically decided to make its selection from among the men mentioned in said list, thereby presenting the matter to the public and requesting that if either of said organizations or any citizen knew of any good reason why any of said parties should not be appointed, as appraiser for

the said city, the Mayor should be advised without delay. No objection was made to any of the persons named in said list, but on the contrary all of them received the approval of said commercial bodies. Upon the list so submitted appeared the names of Frederick P. Stearns, of Boston, Massachusetts; Allen Hazen, of New York City, and M. L. Holman, of St. Louis, Missouri. Thereafter the defendant City and County of Denver appointed said Frederick P. Stearns and said M. L. Holman as its appraisers, and thereafter the four appraisers so selected by the defendant Water Company and the defendant City proceeded to and did select as the fifth appraiser contemplated in and required by the provisions of said ordinance, Allen Hazen, whose name as above stated had been included in the list of those approved by the defendant City and submitted to and approved by the commercial organizations thereof as the list from which the appraisers selected and appointed by the defendant City should be taken. Each of said five appraisers was of na-
25 tional eminence and of the highest reputation and was an hydraulic and civil engineer of unquestioned integrity, and by experience, ability and training, particularly in reference to matters relating to water works and the supply of water to large cities, was in the highest degree qualified in every particular to perform the duties which he assumed.

After the appointment and designation of said appraisers or arbitrators they duly qualified in full conformity with said Ordinance No. 44 of the series of 1890 and said Ordinance No. 163 of the series of 1907, and the contract entered into in pursuance thereof as aforesaid; and thereupon such appraisers or arbitrators proceeded to make an appraisement of all the property and plant constituting the water works of the defendant water company, being the system and property used and necessary to be used in supplying the said city and county of Denver as successor to the city of Denver, and the inhabitants thereof, with water for all purposes. Full hearings were had before said board of arbitrators or appraisers, evidence taken and arguments presented for and on behalf of both parties to said appraisement, to wit, the defendant city and the defendant water company. Personal examinations and investigations were made by said board of arbitrators or appraisers, and after the most careful, thorough, complete and impartial investigation and hearings by them, covering a period of about eighteen months, and after allowing both the defendant city and its representatives and the defendant water company and its representatives the fullest opportunity to be heard in respect to very point involved, the said board of arbitrators or appraisers did, on the 20th day of March, 1909, find and
26 determine, and announce its findings and determination, to the effect that the value of the said property, as of the date of said appraisement, was the sum of fourteen million four hundred thousand dollars ($14,400,000.00), which said amount said board of appraisers announced and determined should be subject to equitable adjustment between the parties as of the date of actual purchase, and relating to changes, if any, which might have occurred since the date to which said appraisement referred, particularly in respect to the stock of material on hand, including the personal

property not directly connected with the system, and including pipes, valves, wood staves, bands and cement, which, as the appraisers announced, could quite readily be done; and also subject to any additions or betterments to the plant which might be made subsequent to the date of said appraisement.

Eleventh. The City and County of Denver has never since the date of the passage and approval of said Ordinance No. 163 of the series of 1907, granted to the defendant water company a new franchise nor made with said company a new contract, changing the terms and conditions of said Ordinance No. 44 of the series of 1890, as contemplated in said Ordinance No. 163 of the series of 1907, nor has it offered so to do. And your orator avers that the acts and transactions hereinabove described constitute and are a binding election by, and firm obligation upon, the defendant city to purchase said water works and property for and at said appraised value of $14,400,000.00, subject to the adjustments specified by said appraisers, in accordance with the existing contract set forth
27 and contained in said Ordinance No. 44 of the series of 1890.

But, notwithstanding, the defendant city wholly disregarding its obligations and agreements in that particular, and with the object and intent, as your orator believes and so charges, of obtaining said property at much less than the appraised value thereof, and of forcing your orator as trustee in said mortgage or deed of trust, as well as the holders and owners of the bonds secured thereby, to part with their interests in said property at a great and ruinous sacrifice and at much less than the total amount of the debt evidenced by said bonds and secured by said mortgage or deed of trust, has hitherto failed and refused, and now expressly refuses, as will hereinafter be more fully disclosed, to complete said purchase or pay for said property at the appraised value thereof, nor has it ever offered so to do. On the contrary, the defendant city immediately following such appraisement entered upon and has ever since persisted in, and is now pursuing, a wholly unconscionable and inequitable course of conduct, intended and calculated to depreciate the value of said property for purposes of sale or transfer, to deprive your orator and said bondholders and the defendant water company of their property without due process of law and to impair the obligation of existing contracts between them, as herein shown, and generally to so complicate the situation and embarrass, hinder and impede your orator as trustee, and the holders and owners of said bonds and the defendant water company, in respect to the exercise and enjoyment of the rights secured to them by said Ordinance No. 44 of the series of 1890, as to eventually force your orator, as such trustee, and said bondholders, as
28 well as the defendant water company, to part with their respective interests in said water works and property, and to release the defendant city and its inhabitants from the obligations imposed by the existing contracts, at a price much less than the said appraised value, and so ruinously inadequate and insufficient as not to cover or discharge the amount of the debt secured by your orator's mortgage or deed of trust.

Your orator avers that in pursuance of such wrongful, illegal and inequitable designs and purposes so conceived by the defendant city, it now claims and pretends, and since such appraisement has claimed and pretended, that under said Ordinance No. 163, of the series of 1907, the appraisement so made was and was intended to be experimental and tentative only, and that the defendant city after having thus determined the value of said water works system and plant as contemplated by section 11 of Ordinance No. 44,of the series of 1890, might thereafter, if satisfied with the valuation thus arrived at, elect to purchase said plant at said appraised value; or if dissatisfied, refuse to proceed with such purchase. But your orator avers that said Ordinance No. 163, of the series of 1907, is not and cannot within constitutional limitations be so construed, but on the contrary, that if such constructions of said ordinance were correct, such ordinance would be a manifest and prejudicial impairment of the prior existing contract between your orator as such trustee and the holders and owners of said bonds on the one part, and the defendant city, as successor to the city of Denver, on the other, and particularly of that portion of said contract contained in section 11 of the Ordinance No. 44, of the series of 1890, which impairment would
29 be and is prohibited by section 10, of article I, of the Constitution of the United States, as well as by the Constitution of the state of Colorado, and would likewise deprive your orator as such trustee, and the holders and owners of said bonds, of their property without due process of law, contrary to the provisions of article XIV of the amendments to the Constitution of the United States, and likewise contrary to section 25, of article II, of the Constitution of the State of Colorado. But your orator avers that the true meaning and intent of said Ordinance No. 163, of the series of 1907, was and is that the defendant city, as successor to said city of Denver, should be and was granted the privilege of causing the appraisement to be made at a date prior to the expiration of the period of twenty years in said Ordinance No. 44 specified, and that the defendant city should and did thereby elect to purchase said water works system and plant at the appraised price, unless it should grant to the defendant Water Company such new franchise or contract, which, as above stated, it has failed and refused to do.

Since the foregoing appraisement was made neither the defendant city nor any of its officials or representatives have made any other or further investigation of the plant or property of the defendant Water Company to ascertain its value or extent, until after the adoption of the charter amendment, section 264-A, hereinafter mentioned, since which time the defendants, Anderson, Van Cise and Fellows, constituting the so-called Public Utilities Commission, in pretended compliance with the terms of such amendment, and for no other purpose, have been making or pretending to make some such investigation. As a matter of fact there has been no
30 substantial change whatever in the extent and value of the property so appraised since such appraisement, except as contemplated in the award of said appraisers, and in that the defendant water company has expended a large sum of money, to wit, six

hundred and ninety-four thousand, three hundred and forty-three dollars and ninety-five cents, for additions, enlargements and betterments to the plant for the better supplying the needs of the defendant city and its inhabitants, which expenditures were necessary in order to keep pace with the growth and necessities of the defendant city, and the amount so expended therefor was reasonable.

At no time since such appraisement was made has the defendant city submitted or offered to submit to the qualified voters of said city at any election, either general or special, the question whether the defendant city should purchase of the defendant water company, or your orator, the said property so appraised, at the said appraised value, except as it has done so in and by Section 264-A of the Charter hereinafter mentioned; but on the contrary, said defendant city has refused and now refuses to submit such question to any further vote of said electors, and especially have the defendants Anderson, Van Cise and Fellows, constituting the Public Utilities Commission, expressly refused to submit to such vote any such question at any election, either the one now called for September 6, 1910, as hereinafter stated or otherwise.

Twelfth. Notwithstanding the foregoing, and in pursuance of the wrongful, illegal and inequitable scheme and plan conceived by the defendant city, and for the purpose of aiding and assisting in the success thereof, there was adopted at the general city
31 election held in the month of May, 1910, by a majority of the qualified electors voting thereon, a so-called amendment to the charter of the city and county of Denver, designated as "Section 264-A", a true copy of which, marked "Exhibit D," is attached to this bill, hereby referred to and made a part hereof. In and by said section 264-A, which is by the defendant city claimed now to be a part of the charter of said city and county of Denver, and as such, in full force and effect as to all of its terms, there is created a Public Utilities Commission, consisting of three members, and there were named therein as the first members of said commission, the defendants Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows, who have subsequently qualified as such, and are now acting and claiming to act as such Public Utilities Commission under and by virtue of said section 264-A, and claiming and attempting to exercise the power and authority which the said section purports to confer upon said Public Utilities Commission.

Said section 264-A, in addition to the creation of said Public Utilities Commission and the specification of its powers, duties and authority, provides that if the defendant Water Company should place in escrow with the Continental Trust Company of Denver, on or before July 1, 1910, a good and sufficient deed of conveyance from the defendant Water Company to the defendant city for all the property of every description included and embraced in the appraisement made under Ordinance No. 163 of the series of 1907, free and clear of all liens and encumbrances, claims and demands of every kind and character, accompanied by a valid surrender and release of any and all rights, claims and demands which said
32 company or any of its subsidiary, associated or affiliated companies might have against the defendant city or against any

of said property, with direction in writing to deliver the same to said commission in exchange for seven million dollars, par value, of the four and one-half per cent. bonds of said city and county, then said commission should file its acceptance with said trust company and the same should constitute a binding contract of purchase. Your orator avers, however, that seven million dollars is less than the amount of the outstanding bonds secured by the mortgage or trust deed to your orator as aforesaid, to say nothing of the outstanding bonds issued and negotiated by the defendant South Platte Company to the amount of four million dollars, as hereinabove mentioned, which are likewise secured by a mortgage or deed of trust constituting a lien upon essential parts of said water works system and property so proposed to be purchased for said seven million dollars. In and by said section 264A it was provided, among other things, that in case the defendant water company should not accept the said seven million dollars in bonds for its plant and property aforesaid, or should fail or refuse to fully comply with the said provisions of said section 264A, then at a special election to be held on the first Tuesday in September, 1910, there should be submitted to the qualified taxpaying electors of said defendant city the question of issuing eight million dollars in bonds of the defendant city, to bear interest at the rate of four and one-half per cent. per annum, of such date and in such form, and maturing at such times, as might be prescribed by said commission, the same to be sold and used to construct and put into operation a complete system of water works for sup-
33 plying said defendant city and the inhabitants thereof with water for all uses and purposes.

Your orator avers that the offer contained in the said section 264A, of seven million dollars for the property and plant of the defendant water company, which had theretofore been appraised for the sum of $14,400,000.00, was not made with any expectation that such offer would be accepted by the defendant water company, because the defendant city and its officials then and there well knew that said offer of seven million dollars was less than one-half the actual value of the property sought to be acquired and of the award made by the appraisers duly appointed as aforesaid; but such offer was made by the defendant city, its officials and the said public utilities commission as a part of the above mentioned conspiracy and plan between said parties and certain newspapers and agitators in the defendant city to destroy and affect the value of the property belonging to the defendant water company and covered by said appraisement, and to so injure the same and to discredit the securities of said company as to enable the defendant city to obtain said property and plant at less than the appraised value and far less than its actual cash value.

The defendant water company did not, prior to the first day of July, 1910, the date fixed by said charter amendment, make, execute or deposit, or cause to be made, executed or deposited, any deed or deeds of conveyance or conveyances of said property constituting its water works plant or system and appraised as aforesaid at the value of $14,400,000.00, conveying or attempting to convey or transfer the same free and clear of liens and encumbrances or otherwise to

the defendant city for or at the price of seven million dollars in bonds as aforesaid; nor would your orator, as trustee in said
34 deed of trust or mortgage and as the representative of the holders and owners of the bonds secured thereby, have joined in such a conveyance or have permitted the same to be made, nor could it have done so without violating the obligations imposed upon it by said deed of trust or mortgage and totally disregarding its duties to said bondholders.

Thirteen. Because and in view of the failure of the defendant Water Company to make or cause to be made said deed or deeds of conveyance and to deposit the same as aforesaid on or before July 1, 1910, said Public Utilities Commission and the defendants, Anderson, Van Cise and Fellows, the members thereof, claiming and pretending to act under and in pursuance and by virtue of said Section 264A, but in reality in furtherance of the aforesaid conspiracy and plan for the purpose of depreciating the value of the property of the defendant Water Company and with the intent and expectation of ultimately obtaining or purchasing the same at a reduced price, regardless of said appraisement, have caused to be introduced in and passed and enacted by the Council of the City and County of Denver an ordinance, designated as Ordinance No. 98 of the Series of 1910, approved July 6, 1910, heretofore published and now in full force and effect, so far as it lawfully may be effective, calling an election for the first Tuesday in September, 1910, as provided by said Charter Section 264A, and providing, among other things, that in event of the failure of the defendant Water Company to place said deed of conveyance in escrow as aforesaid on or before July 1, 1910, there shall be submitted at said election to the qualified tax-
35 paying electors the question of issuing eight million dollars in bonds, to be sold or used to construct and put into operation a complete system of water works for supplying said defendant City and its inhabitants with water for all uses and purposes, and further providing that the ballot to be used at said election shall have printed on it the words "For the issuance of $8,000,000 in bonds for the construction of a new municipal water plant" and on a separate line the words "Against the issuance of $8,000,000 in bonds for the construction of a new municipal water plant," with a space opposite each of said lines in which the voter may make his mark indicating his vote. A true copy of said ordinance, marked "Exhibit E," is attached to this Bill of Complaint, hereby referred to and made a part hereof.

In and by the provisions of said Section 264A of the said Charter, as well as by the provisions of the ordinance calling said election and submitting said question, the said bonds, if authorized, can be issued and used and the proceeds thereof applied solely to the construction of and putting into operation a complete, separate municipal system of water works, and that the same cannot, nor can any part thereof, be devoted to the purchase of the existing water plant or water works now owned or controlled by the defendant Water Company, nor can the same or any part thereof be devoted to the payment of said appraised price of $14,400,000.00 therefor, and if at said special election such bonds be authorized by a majority of the qualified tax-pay-

ing electors voting thereon, then and in that event the defendant city is absolutely committed to the expenditure of said sum of money or of the proceeds of the bonds issued to said amount for the
36 purpose of constructing a new plant wholly independent, apart, separate and distinct from the plant now owned or controlled by the defendant water company and appraised as aforesaid, notwithstanding and in spite of the fact, as herein alleged, that the defendant city has heretofore elected to and is now bound to purchase the said plant and water works system owned or controlled by the defendant water company and appraised as aforesaid for and at said appraised value of $14,400,000.00.

Your orator avers that it is an impossibility for the defendant City for the sum of eight million dollars or for any sum less than two or three million dollars in excess of the appraised value of defendant Water Company's plant as aforesaid, to construct such an independent and municipal plant and secure therefor a supply of water which will meet the needs of the defendant City and County of Denver and its inhabitants, and that no such supply can be obtained or plant completed without the purchase and use of a large portion of the property belonging to the defendant water company and heretofore appraised, and particularly the water rights, reservoirs and filtration beds.

Fourteenth. In and by the Constitution and statutes of the State of Colorado and the provisions of the charter of the City and County of Denver applicable thereto, the defendant city as a municipal corporation is authorized to contract for a supply of water for its city and municipal purposes and for the use of its inhabitants, by proper arrangement with private individuals or corporations owning or supplying the necessary water works or plant, or said defendant
37 city as a municipal corporation is authorized by construction, purchase or lease to acquire and operate a water works system and plant with the necessary property and appurtenances, and thereby itself obtain and furnish such supply of water for municipal purposes and for the uses of its inhabitants. But the defendant City and County of Denver is not authorized by any provision of the Constitution, statutes or charter relative thereto, but on the contrary is without authority, to obtain by purchase a complete water works system already constructed and in existence and already furnishing and prepared to furnish an adequate supply of water to the defendant city and its inhabitants for all purposes, both now and in the future, and at the same time to construct and put into operation another and duplicate complete system of water works for supplying the defendant city and its inhabitants with water for all uses and purposes, or to authorize, issue or sell its bonds for said last named purpose, as it now proposes and intends to do, and with a view to which said election hereinabove mentioned has been called and as said section 264A of the charter purports to require it to do as hereinabove set forth. And inasmuch as prior to the adoption by vote of said section 264A and prior to the passage of said Ordinance No. 98 of the series of 1910 calling said election, the defendant city had already entered into a binding contract with the defendant water company and with

your orator as trustee in said mortgage or deed of trust and through your orator, as such trustee, with the holders and owners of the bonds secured thereby, to purchase the existing water works and plant for the said sum of $14,400,000.00 as appraised, subject to the aforesaid adjustments, section 264A, insofar as it purports
38 to require the submission to a vote of the question of issuing said eight million dollars in bonds to be sold or used to construct and put into operation a complete new system of water works, and said Ordinance No. 98 of the series of 1910 passed pursuant to the authority claimed to have been conferred by said section 264A, calling an election for said purpose, and said election for said purpose, if held, and said bonds and each thereof, if authorized and issued, were and are, and each of them was and is and will be, wholly beyond the powers, express or implied, of the defendant city as a municipal corporation.

Fifteenth. Your orator further avers that even though there had been no election by the defendant city to purchase said water works system of the defendant water company prior to the adoption of the said section 264A of the charter of the City and County of Denver, that section, when construed in connection with the prior existing contracts as aforesaid, constitutes an election to purchase said property as so appraised under and by virtue of the aforesaid Ordinance No. 44 of the series of 1890, and therefore by reason of the foregoing appraisement the defendant city is by the very terms of said charter amendment now obligated to purchase said property at said appraised price of $14,400,000.00, subject to the adjustments aforesaid. But should said charter amendment be held not to bind the defendant city to pay for said property such appraised amount, then and in that event the same constitutes in and by its terms, when construed in connection with the prior and existing contracts between the defendant city and the defendant company, and particularly
39 section 11 of said Ordinance No. 44 of the series of 1890, an absolute election to purchase said property covered by said section 11 of said ordinance and by said appraisement, and an offer on the part of the defendant city to pay therefor the sum of seven million dollars in bonds. And as the defendant water company by its refusal to deposit its deed in escrow as provided by said section 264A, and otherwise, has refused to sell said property for the sum so offered in and by said section, it became necessary to have such purchase price determined by a board of appraisers or arbitrators as provided in said section 11 of Ordinance No. 44 of the series of 1890, which provides that in event of a failure of the defendant city and the defendant water company to agree as to the purchase price, the same shall be fixed by a board of appraisers or arbitrators to be selected as therein prescribed. But notwithstanding its election to purchase and such failure to agree upon the purchase price, and notwithstanding its express covenants contained in said section 11 of said Ordinance No. 44, the defendant city has totally failed and refused and still fails and refuses to name or designate its appraisers or arbitrators under said section or to proceed to any such appraisement. On the contrary by the terms of said section 264A and the declara-

tions and acts of its Public Utilities Commission, the defendant city intends and proposes to repudiate its obligation to submit such question to such an appraisement, and having failed in its scheme and device to force the defendant water company and your orator to accept such grossly inadequate and insufficient amount of seven million dollars in bonds for such water system, it proposes to vote
40 bonds for the avowed purpose of constructing its own municipal water plant, as elsewhere herein fully related.

Sixteenth. Your orator avers that said section 264A of the charter is in conflict with article I, section 10, of the Constitution of the United States, and with article II, section 11, of the Constitution of the state of Colorado, and also in conflict with article XIV of the amendments to the Constitution of the United States, and with section 25, article II, of the Constitution of the state of Colorado, to the extent hereinafter specified, and in the following respects and each of them:

(*a*) It constitutes an impairment of the prior existing contract between the defendant city on the one part and the defendant water company, your orator as trustee in said deed of trust or mortgage and the holders and owners of the bonds secured thereby, on the other part, and constitutes an attempted deprivation of your orator as such trustee and the bondholders which it represents, as well as the defendant water company, of its and their property without due process of law, in that in and by said section 11 of Ordinance No. 44 of the series of 1890 the defendant city is and was prior to the pretended adoption of said charter amendment obligated to purchase the said water works system and plant for and at the price to be arrived at by an appraisement as provided in said section 11, and not otherwise, nor at any other price or valuation whatsoever, and by the steps heretofore taken as hereinabove recited, the defendant city had elected to, and prior to the pretended adoption of said section 264A, was bound and obligated to purchase said water
41 works system and plant for and at the appraised valuation of $14,400,000.00, subject to the foregoing adjustments; in spite of which and in direct conflict with the provisions of said contract to purchase and in impairment of its terms, the defendant city has adopted said amendment to its charter, whereby all the authority of the defendant city relative to the acquisition or operation of water works and supplying the defendant city and its inhabitants with water for all purposes, purports to be committed to said Public Utilities Commission which is to have complete charge and control thereof, and which despite the provisions of said prior existing contract and the proceedings thereunder, is authorized and directed to pay for said water works and plant theretofore and at the instance of the defendant city and under the provisions of said contract, appraised at the valuation of $14,400,000.00, subject to such adjustments, no more than the sum of seven million dollars, to be paid in bonds of the defendant city at their par value, which bonds shall draw interest at the rate of four and one-half per cent. per annum and be of such date and in such form and maturing at such times as may be prescribed by said Public Utilities Commission; and under the ex-

press terms of said charter amendment, should the defendant water company and your orator refuse to accept such grossly inadequate and insufficient and totally illegal offer, then that the defendant city shall issue its bonds for the purpose of constructing, and shall construct, its separate municipal water plant—all as hereinabove more fully alleged.

(*b*) Even though there had been no election upon the part of the defendant city to purchase said water plant and system prior
42 to the adoption of said section 264A, as in truth and in fact there was, nevertheless in and by said section 264A, as construed in the light of the prior existing contracts and obligations of the defendant city and the defendant water company, the city and county of Denver has elected to make such purchase at the appraised value, and by reason thereof a binding contract was entered into whereby the defendant city become obligated to pay to the defendant water company the appraised value of said property and plant as aforesaid. But notwithstanding said election contained in said section 264A to purchase said property and plant at said appraised value, and totally disregarding the rights of the defendant water company and your orator, and in direct impairment of said contract to purchase under section 11 of Ordinance No. 44 of the series of 1890, said section 264A proceeds to provide that unless the defendant water company shall accept the totally insufficient, inadequate and illegal offer of seven million dollars for its water plant, the defendant city will proceed to vote bonds for the purpose of constructing its own municipal water plant, and will proceed to such construction—all as is hereinbefore more fully alleged.

(*c*) Even though there had been no election to purchase said property and plant of the defendant water company at the appraised value or otherwise prior to the adoption of said section 264A, nevertheless in and by the said section itself, when construed in connection with section 11 of Ordinance No. 44 of the series of 1890, the defendant city elected to purchase the said plant and property of the defendant water company, and offered to pay therefor the
43 sum of seven million dollars in bonds of the defendant city—all as hereinabove more fully specified; and upon the refusal of the defendant water company to accept such offer, as hereinbefore shown, a disagreement arose between the parties as to the price to be paid therefor, and a binding contract and agreement was created under and by virtue of said section 11 of said Ordinance No. 44, whereby the question of the price to be paid by the defendant city for said property should be determined by appraisers or arbitrators appointed in the manner specified in said section 11. Notwithstanding, however, the creation of such obligation, said section 264 A proceeds by its terms to impair such contract, in that it provides that should the defendant water company refuse to accept such offer to purchase said water system at and for seven million dollars of the bonds of the defendant city, said defendant city shall forthwith proceed to vote and issue its bonds for the purpose of constructing its municipal water plant and shall construct the same—all as hereinbefore fully alleged.

Seventeenth. In pursuance of the aforesaid wrongful plan and purpose so devised by the defendant city and county of Denver, the said city and the inhabitants thereof and the users and consumers of water from said plant or system of the defendant water company have been, and are now, claiming and pretending that each and every right, contract and privilege theretofore owned, enjoyed or exercised by the defendant water company or your orator as trustee in said deed of trust or mortgage for the benefit of said bondholders, as resting upon any ordinance, contract, franchise or agreement binding upon the defendant city or any of the inhabitants thereof
44 or any users or consumers of water therein, ceased, terminated and came to an end on the 10th day of April, 1910, and that the defendant water company is doing business within the City and County of Denver as a water company and furnishing water to said city and its inhabitants and occupying the streets, alleys, avenues and other public places of said city solely by sufferance and at the will of said municipality and the inhabitants thereof, and that there is no existing contract with or obligation upon the said city to purchase the said water works and plant of the defendant water company at the appraised value of $14,400,000.00, or at any other price or at all, or any other contract, agreement or obligation of any nature whatsoever; all of which claims and pretenses are wholly without foundation in law or equity, are unconscionable and extremely prejudicial, and are made and advanced and reiterated and insisted upon with the sole purpose and intent, and with the result, of depreciating the value of said property, and the same have already impaired the security of the owners and holders of the bonds for whom your orator is trustee as aforesaid, and, if persisted in, will further very greatly impair, if not wholly destroy, the interest of your orator as trustee and the holders of said bonds in said property.

Eighteenth. In and by the said mortgage or deed of trust in and under which your orator is trustee as aforesaid, there was conveyed and assigned to your orator not only all of the physical and tangible property then owned and thereafter to be acquired by the defendant water company, but also all franchises, ordinances, rights, contracts, choses in action, and all property, real, personal and mixed,
45 of every kind and nature whatsoever then owned or thereafter to be acquired by said defendant water company, and also all of the income arising or to be derived therefrom and the rents, issues and profits thereof. And it was and is further provided therein that in case of the purchase of the works and property of the defendant water company by the defendant city as contemplated in and by section 11 of said Ordinance No. 44 of the series of 1890, then and in that event all of the moneys to be received by the defendant water company from the defendant city on account of said purchase should be payable to your orator directly from the said city, and the same were by said mortgage or deed of trust assigned to your orator for the purpose of the trusts by said instrument created; and is was provided therein that in case of such purchase your orator was authorized and required during the year commencing April 10,

1910, and ending April 9, 1911, to make a call of all the bonds outstanding and with the moneys derived from the sale of said works to the defendant city to pay said bonds with accrued interest to the date of payment, and the costs and charges of the trustee in the premises, and return all surplus moneys, if any, to the defendant water company, its successors or assigns.

Nineteenth. Your orator further avers that The Denver Union Water Company and its officers and directors claim and assert that the valuation of $14,400,000 so placed upon said property by the board of appraisers was and is inadequate and insufficient, and that said property at a fair valuation is and was at the time of said appraisement reasonably worth a sum largely in excess of $14,400,000

46 and further assert that while said company has heretofore in all respects complied with, and hereafter will in all respects comply with and fulfill, all of its contract obligations to and with the said city and county and with your orator, yet, in the opinion of said company and its officers and directors, the said city and county of Denver, by reason, among other things, of its failure and refusal to consummate the purchase of said property at such appraised value and its repeatedly declared position that it is not obligated so to do, and its wholly inequitable and unlawful conduct as herein set forth, has become obligated to said The Denver Union Water Company to renew its contract with said company for the additional period of twenty years, as provided in said Ordinance No. 44 of the series of 1890, and that said company and its officers and directors are of the opinion, and have determined, that it is to the best interest of said company and its stockholders not to bring or maintain any suit or proceeding against said City and County of Denver founded on any contract or election to purchase said property, either at the said appraised value or otherwise, but, on the contrary, to assert and litigate the right of said company to such new contract with the said City and County of Denver for such additional period of twenty years. Therefore, the said company has failed and refused, and still does fail and refuse, to institute or maintain, or to direct or authorize the defendant South Platte Company, which it controls, to institute or maintain, either alone or jointly with your orator, any suit or proceeding whatever to compel the City and County of Denver to purchase the said property at the price fixed and determined by said board of appraisers, or at a price to be fixed by appraisement, or any suit or proceeding to enforce

47 any election or obligation of said city and county to purchase said property; and the defendant South Platte Company, for like reasons and acting under the control of the defendant water company, likewise refuses so to do. Your orator avers that if the existing contract with the City and County of Denver be specifically enforced and the said city and county be required to complete said purchase and pay the purchase price aforesaid, ample means will be afforded to discharge all liens upon said property and pay in full all bonds secured by the deed of trust or mortgage in which your orator is trustee as aforesaid, and which your orator has the right to call in and pay at par and accrued interest, at any time prior to April 9,

1911, and also pay in full all of the outstanding bonds of said South Platte Company, and leave a considerable sum to be paid and returned to said The Denver Union Water Company and the South Platte Company, as and for their respective equities in said properties. But unless the said contract be specifically enforced and said purchase completed and the purchase price paid, the result will be that by reason of the various acts and doings of the said City and County of Denver and its representatives heretofore done and now being carried on and threatened to be done, as herein set forth, the saleable value of the property which constitutes the security held by your orator for the benefit of said bondholders will be very greatly impaired and reduced, the income from said property entirely destroyed, and thereby it will be impossible for The Denver Union Water Company to pay, or for your orator to realize therefrom for the benefit of the bondholders, a sum sufficient to satisfy the
48 principal and interest of such bonds, and furthermore, the market value of such bonds in the hands of the holders thereof will also be greatly impaired and diminished, if they are not rendered entirely unmarketable. If said bond election now set for the 6th day of September, 1910, is permitted to be held, and such proposed issue of bonds authorized thereat, and such bonds are allowed to be issued and sold for the purpose of constructing and putting in operation a complete system of municipal water works, as said city and county now proposes, and unless prevented by injunctive process of this court will proceed to do, the said city and county will thereby be practically and irrevocably committed to the construction of a new, separate, independent and duplicate system of water works, which would be in competition with that of your orator and the defendant Water Company, and destructive of its income-producing, as well as saleable, value; thereby not only greatly impairing, if not entirely destroying, the value of the security held by your orator as trustee for the benefit of the bondholders as aforesaid, but also placing upon the city and county and all its inhabitants and property owners and taxpayers a great, excessive and useless burden of indebtedness, to the extent not only of $8,000,000, but of many additional millions of dollars which must necessarily from time to time be authorized and incurred if such municipal water plant is to be completed and put in commission. And while providing for the principal and interest of said indebtedness the city and county and its inhabitants, property owners and taxpayers must also provide for, and pay, the appraised purchase price of the existing water works system and plant, as it is now obligated to do, and also continue to pay for the supply of water furnished thereby to said city and county and its inhabitants.

49 Twentieth. Your orator further avers that it has no plain, speedy, adequate or any remedy at law; that it is willing and hereby offers, so far as its interests in said plant is concerned, to complete the sale thereof to the defendant city for and at the appraised valuation, and otherwise to abide by any order or decree in the premises which may be made herein; but that the defendants water company and South Platte Company must necessarily join in

any such conveyance, and for the reasons hereinbefore set forth said companies, and each of them, and their respective officers and directors, are unwilling to join in such a conveyance, and will not do so unless directed and required so to do by competent legal authority. And unless prevented by order of this honorable court and required in all particulars to fulfill, carry out and perform the terms of existing contracts, the defendant city will persist in the inequitable and unconscionable course of conduct hereinbefore recited, and will not abide by or perform the said contracts hereinabove set forth or any part thereof—all of which will necessarily result in great and irreparable damage and injury to your orator as trustee in said deed of trust or mortgage, and to the holders and owners of the bonds secured thereby.

Twenty-first. The defendant, Robert W. Speer, as the mayor of the City and County of Denver, is its chief executive officer, and the bonds proposed to be authorized and issued for the construction and putting in operation of a complete new municipal water plant as aforesaid must, by the terms of said section 264A of the charter, be executed on behalf of the defendant city by said mayor, and
50 must also be signed and attested on behalf of said city by the defendant, Burt F. Davis, as its clerk, under the seal of the city, must also be registered by the defendant, Albion K. Vickery, as auditor of said city; and the defendants, Ellis Meredith, A. E. Mauff and Harry Petrie, as members of and constituting the Election Commission of the said City and County of Denver, under the existing charter of said city and county, are vested with exclusive authority over the conduct, management and control of said election to be held on the first Tuesday of September, 1910, as aforesaid, including the registration of voters, the holding of said election, the appointment of judges therefor, the canvassing of the returns thereof, the issuing of certificates of election, and all other matters pertaining to said election.

Twenty-second. Under and in accordance with the award of the appraisers above set forth, made pursuant to said Ordinance No. 44 of the series of 1890, certain adjustments will be required in the amount of the award, due to any changes in the amount of property owned by the defendant water company and covered by said appraisement, and that an additional amount should and must be added for property since acquired and due deduction made for property which has been disposed of, or for depreciation.

Wherefore, and for as much as your orator is remediless in the premises at and by the strict rules of the common law, and can have relief only in a court of equity where matters of this nature are properly cognizable and reviewable, it brings this its bill of complaint and prays, the premises considered:

51 1. That your Honors may grant unto your orator the writ of subpœna directed to the defendants herein named, to wit: The City and County of Denver, a municipal corporation; Robert W. Speer, as mayor of said City and County of Denver; Burt F. Davis, as clerk of said City and County of Denver; Albion K. Vickery, as auditor of said City and County of Denver; Armour C. An-

derson, Edwin Van Cise and A. Lincoln Fellows, as members of and constituting the Public Utilities Commission of said City and County of Denver; Ellis Meredith, A. E. Mauff and Harry Petrie, as members of and constituting the Election Commission of said City and County of Denver; The Denver Union Water Company, a corporation, and The South Platte Canal and Reservoir Company, a corporation, and each of them, thereby commanding them and each of them at a certain time and under a certain penalty therein to be named, personally to be and appear before this honorable court, then and there to answer unto all and singular the matters aforesaid (but not under oath, all answers under oath being hereby expressly waived) according to the practice and rules of this court, and to stand and abide by and perform such orders, directions and decree as shall be made herein and as to your Honors shall seem equitable and just; also the writ of injunction, as herein prayed.

2. May it please your Honors to grant unto your orator the writ of injunction issued out of and in accordance with the rules and practice of this honorable court, to be directed to the defendants, the City and County of Denver, a municipal corporation; Robert W. Speer, as mayor of said City and County of Denver; Burt E. Davis, as clerk of said City and County of Denver; Albion K. Vick-
52 ery, as auditor of said City and County of Denver; Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows, as members of and constituting the Public Utilities Commission of said City and County of Denver; and Ellis Meredith, A. E. Mauff and Harry Petrie, as members of and constituting the Election Commission of said City and County of Denver, and each of them, restraining them and each of them, and the respective successors in office of them and each of them; the officers, agents, servants, employés, representatives and confederates of them and each of them; from holding or attempting to hold the said election on the first Tuesday in September, 1910, as now proposed, or at any other date whatsoever for the purpose of submitting the question as to the issuance of said eight million dollars in bonds, or any amount in bonds whatsoever, to be sold or used for the construction and putting in operation, or either thereof, of a new system of water works; and from issuing or attempting to issue, or signing, sealing, attesting, registering or delivering said or any bonds for that purpose; and from doing or attempting to do any act or thing whatsoever looking to or tending to accomplish or assist in the accomplishing of any of the things hereinabove sought to be enjoined; or from taking any steps whatsoever looking to the construction of a municipal water plant for said City and County of Denver; as also a restraining order to the same effect until an application for such injunction can be heard, and that at the final hearing, such injunction be made perpetual.

3. May it please your Honors to enter a decree herein declaring those provisions of the aforesaid section 264A of the charter
53 of the City and County of Denver, contemplating and providing for the construction and operation of a municipal water plant, and the authorization and issuance of bonds for that purpose, to be wholly and entirely void and of no effect, for the reason that

they and each of them are in conflict with, and in violation of the articles and sections of the Constitutions of the United States and of the state of Colorado, hereinbefore specified; and also in and by said decree declaring the true force and effect of the existing contract relations between the defendant City and County of Denver, on the one part, and the defendant, The Denver Union Water Company, your orator as trustee in said deed of trust or mortgage, as aforesaid, and the holders and owners of bonds secured thereby and represented by your orator, on the other part; and decreeing that in and by said existing contract relations the defendant City and County of Denver is obligated to complete the purchase, and the defendants, The Denver Union Water Company and The South Platte Canal and Reservoir Company, are likewise obligated to complete the sale of said plant or system of water works for and at the appraised value thereof, and the said the City and County of Denver shall be prohibited meanwhile from constructing or attempting to construct a new and independent municipal water plant, and declaring and decreeing your orator's interest in said property, and providing for the payment of the purchase price thereof to your orator, to the end that your orator may fully perform, carry out and fulfill the trust imposed upon it by said deed of trust or mortgage, and after applying said purchase price, so far as the same may be necessary, to the payment and discharge of said outstanding bonds, accrued in-
54 terest and the costs and expenses of said trust, including its reasonable costs and expenses herein incurred, that it may return the balance to said The Denver Union Water Company as in said trust deed contemplated and required; and that in and by said decree said defendants The Denver Union Water Company and The South Platte Canal and Reservoir Company shall be ordered, required and directed to convey or cause to be conveyed to said the City and County of Denver, upon payment of said purchase price as aforesaid, all of said property, and shall likewise be required out of said purchase price to pay, satisfy and discharge all outstanding liens upon said property, and that otherwise said defendants, The Denver Union Water Company, The South Platte Canal and Reservoir Company and the City and County of Denver shall be directed, required and decreed to fully and in all particulars carry out and fulfill and perform said existing contracts, and that the same may be in all respects by this court specifically enforced in accordance with their terms as this court may find and decree them to be;

Or, should your Honors find and determine that by reason of the premises the said City and County of Denver has elected to purchase the water plant and system owned and controlled by the defendant The Denver Union Water Company, but that notwithstanding the premises the purchase price thereof has not yet been fixed or determined, then may it please your Honors to proceed either through a master or appraisers, to be appointed by your Honors, or otherwise as your Honors may see fit, to ascertain, appraise, determine and decree the value of said plant and property in accordance
55 with the existing contracts between the defendants the City and County of Denver and The Denver Union Water Company relating thereto, and the purchase price in cash which shall be

paid by the defendant city therefor; and thereupon decreeing that the defendant city is obligated to purchase, and the defendants The Denver Union Water Company and The South Platte Canal and Reservoir Company and your orator are obligated to sell such property at such price so ascertained, and that the defendant the City and County of Denver shall forthwith pay, and under proper penalties named in said decree shall be required to pay, unto your orator the said purchase price so ascertained, to the end that your orator may apply the same as specified in the last preceding paragraph of the prayer of this bill, and that the defendants The Denver Union Water Company, The South Platte Canal and Reservoir Company and the City and County of Denver shall likewise by said decree be required to do and perform all of the acts and things and to make the conveyances which by the last preceding paragraph of this prayer your orator prays they may be required to do, perform and make in event that it shall be determined and decreed by your Honors that there is now a binding contract and obligation between the defendant The Denver Union Water Company and the defendant the City and County of Denver for the sale and purchase of said plant at said appraised value.

And that your orator may have such other, further and different relief in the premises as the nature of the case, equity and
56 good conscience may require; and your orator further prays for its costs in this behalf expended.

THE NEW YORK TRUST COMPANY,
Complainant.

By JOEL F. VAILE,
HENRY McALLISTER, JR.,
WILLIAM N. VAILE,
Its Solicitors.

UNDERWOOD, VAN VORST & HOYT,
J. MARKHAM MARSHALL,
VAILE, McALLISTER & VAILE,
Of Counsel.

STATE OF COLORADO,
City and County of Denver, ss:

Henry McAllister, Jr., being duly first sworn, on his oath deposes and says that he is one of the solicitors for the above-named complainant, The New York Trust Company, which is a corporation organized and existing under and by virtue of the laws of the state of New York; that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true to the best knowledge and belief of affiant.

HENRY McALLISTER, JR.

Subscribed and sworn to before me, this 22nd day of August, 1910.

My commission expires January 2, 1912.

[SEAL.] JOHN W. E. RIDGWAY,
Notary Public.

57 "EXHIBIT A."

Denver, Ordinance No. 44, 1890.

SECTION 1. The right and privilege of laying down, continuing and maintaining water pipes, valves, hydrants and apparatus for the conveyance and distribution of water in, upon, along and through the following streets, avenues, alleys and public places of the city of Denver and additions thereto, to wit:

For the entire length of the following named streets and avenues: First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Nineth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth, Fifteenth, Sixteenth, Seventeenth, Eighteenth, Nineteenth, Twentieth, Twenty-first, Twenty-second, Twenty-third, Twenty-fourth, Twenty-fifth, Twenty-sixth, Twenty-seventh, Twenty-eighth, Twenty-ninth, Thirtieth, Thirty-fist, Thirty-second, Thirty-third, Thirty-fourth, Thirty-fifth, Thirty-sixth, Thirty-eighth, Thirty-ninth, Fortieth, Forty-first, Forty-second, Forty-third, Forty-fourth streets, Cleveland place, Court place, Tremont, Glenarm, Welton, California, Sout, Champa, Curtis, Arapahoe, Lawrence, Larimer, Market, Blake, Wazee, Wynkoop, Wewatta, Delgany, Bassett, Water, Platte, Pierce, Frances, Johns streets, Ashland avenue, Fay street, Bigler street, Fairview avenue, Gray, Bert, Mary, Goss, Arlington, Witter streets, Clear Creek avenue, Bayaud street, Alameda avenue, Byers, Cedar, Maple, Ellsworth streets, West First avenue, First avenue, West Second avenue, Second avenue, West Third avenue,
58 Third avenue, West Fourth avenue, Fourth avenue, West Fifth avenue, Fifth avenue, West Sixth avenue, Sixth avenue, West Seventh avenue, Seventh avenue, West Eigth avenue, Eighth avenue, West Ninth avenue, Ninth avenue, West Tenth avenue, Tenth avenue, West Eleventh avenue, Eleventh avenue, West Twelfth avenue, Twelfth avenue, West Thirteenth avenue, Thirteenth avenue, West Fourteenth avenue, Fourteenth avenue, West Fifteenth avenue, Fifteenth avenue, Sixteenth avenue, Seventeenth avenue, Eighteenth avenue, Nineteenth avenue, Twentieth avenue, Twenty-first avenue, Twenty-second avenue, Twenty-third avenue, Twenty-fourth avenue, Twenty-fifth avenue, Twenty-sixth avenue, Twenty-seventh avenue, Twenty-eighth avenue, Twenty-ninth avenue, Thirtieth avenue, Thirty-first avenue, Thirty-second avenue, Thirty-third avenue, Thirty-fourth avenue, Thirty-fifth avenue, Thirty-sixth avenue, Thirty-seventh avenue, Thirty-eighth avenue, Thirty-ninth avenue, Fortieth avenue, South Seventh street, South Eighth, South Ninth, South Tenth, South Eleventh streets, Santa Fe avenue, Clark, South Water, South Twelfth, South Tremont, South Thirteenth, Evans, South Fourteenth, South Fifteenth streets, Broadway, Lincoln avenue, Sherman avenue, Grant avenue, Logan avenue, Wasoola street, Parkinson street, Pennsylvania avenue, Pearl street, Washington, Clarkson, Venice, Alta, Corona, Hallett, Corsline, Inslee, Hunt, Franklin, Gilpin, Williams, High, Race, Vine, Green, York streets, Josephine avenue, Columbine avenue, Murdock

avenue, Clayton, Fillmore, Finley avenues, Clellan avenue,
59 Walnut street, Estes, Legge, Parsons, Stallcup, Apple, Banana, Cherry, Damson, Elder, Fruit, Grape, Hazel, Lemon, Melon, Orange, Plum, Miner, Barnum, Marshall, Louis, Randolph, Pacific, East Larimer, East McClellan streets, Allen avenue, Downing avenue, Pierpont street, Emerson avenue, Ogden street, Marion, Lafayette, Humboldt, Backus, Edmonds, Murdock, Scott, Kent, Wanless streets, Bell avenue, Palmer street, Clifton, Justina, Merrill, Converse, Everett, Argo, Lowell, Quincy streets, Prospect avenue, Beecher avenue, Greeley avenue, Dakota avenue, Colorado avenue, Wyoming avenue, Erie street, Boulder, Central, Cheyenne, Hartford, New Haven, Division streets, Stanton avenue, McNassar avenue, Corbett street, Montgomery, Winne streets, Gerspach avenue, Williams streets, Center, Vintage, Maple, Logan, Elizabeth, Detroit, St. Charles, Cleveland, St. George, Milwaukee, St. Ann, St. Paul, St. Francis, Washington, Adams, Jefferson, Madison, Monroe, Charles, Jackson, Harrison streets, Colorado boulevard, Titus street, Grand avenue, Park avenue, Agricultural place, Commercial place, and Cheyene street.

For the entire length of the following alleys:

Alley between First and Second streets, alley between Second and Third streets, alley between Third and Fourth streets, alley between Fourth and Fifth streets, alley between Fifth and Sixth streets, alley between Sixth and Seventh strets, alley between Seventh and Eighth streets, alley between Eighth and Ninth streets, alley between Ninth and Tenth streets, alley between Tenth and Eleventh streets, alley between Eleventh and Twelfth streets, alley between Twelfth
60 and Thirteenth streets, alley between Thirteenth and Fourteenth streets, alley between Bassett and Williams streets, alley between Williams and Delgany streets,alley between Delgany and Wewatta streets, alley between Wewatta and Wynkoop streets, alley between Wynkoop and Wazee streets, alley between Wazee and Blake streets, alley between Blake and Market streets, alley between Market and Larimer streets, alley between Larimer and Lawrence streets, alley between Lawrence and Arapahoe streets, alley between Arapahoe and Curtis streets, alley between Curtis and Champa streets, alley between Champa and Stout streets, alley between Stout and California streets, alley between California and Welton streets, alley between Welton and Glenarm streets, alley between Glenarm and Tremont streets, alley between Glenarm street and Grant avenue, alley between Tremont street and Court place, alley between Cleveland place and Court place, alley between Cleveland place and Cheyenne street, alley between Grant avenue and Wasoola street, alley between Wasoola and Parkinson streets, alley between Parkinson and Cheyenne streets, alley between city limits and Gray street, alley between Gray street and Bert streets, alley between Bert and Mary streets, alley between Fifteenth and Sixteenth streets, alley between Sixteenth and Seventeenth streets, alley between Seventeenth and Eighteenth streets, alley between Eighteenth and Nineteenth streets, alley between Goss and Arlington streets, alley between Arlington and Witter streets, alley between Witter street and Clear Creek

avenue, alley between Nineteenth street and Fairview avenue,
61 alley between Clear Creak and Bell avenues, alley between Bell avenue and Palmer street, alley between Palmer and Clifton streets, alley between Clifton and Justina streets, alley between Justina and Merrill streets, alley between Merrill and Converse streets, alley between Converse and Edmond streets, alley between Everett and Argo streets, alley between West Fourth avenue and Center street, alley between Vintage and Maple streets, alley between Maple and Titus streets, alley between South Seventh and South Eighth streets, alley between South Eighth and South Ninth streets, alley between South Ninth and South Tenth streets, alley between South Tenth and South Eleventh streets, alley between South Eleventh street and Santa Fe avenue, alley between Santa Fe avenue and Clark street, alley between Clark and South Water streets, alley between South Water and South Twelfth streets, alley between South Twelfth and South Tremont streets, alley between South Tremont and South Thirteenth streets, alley between South Thirteenth and South Evans streets, alley between Evans and South Fourteenth streets, alley between South Fourteenth and South Fifteenth streets, alley between South Fifteenth street and Broadway, alley between Broadway and Lincoln avenue, alley between Lincoln avenue and Sherman avenue, alley between Sherman avenue and Grant avenue, alley between Grant avenue and Logan avenue, alley between Logan avenue and Pennsylvania avenue, alley between Pennsylvania — and Pearl street, alley between Pearl street and Washington avenue, alley between Washington avenue and Clarkson street, alley between Clarkson and Venice streets, alley be-
62 tween Venice and Alta streets, alley between Alta and Corona streets, alley between Corona and Hallett streets, alley between Corsline and Inslee streets, alley between Hallett and Corsline streets, alley between Inslee and Hunt streets, alley between Hunt and Franklin streets, alley between Franklin and Gilpin streets, alley between Gilpin and Williams streets, alley between Williams and High streets, alley between High and Race streets, alley between Race and Vine streets, alley between Vine and Gaylord streets, alley between Gaylord and York streets, alley between Clarkson street and Emerson avenue, alley between Emerson avenue and Ogden street, alley between Ogden street and Downing avenue, alley between Downing avenue and Marion street, alley between Marion street and Lafayette street, alley between Lafayette street and Humboldt street, alley between York street and Josephine avenue, alley between Josephine avenue and Columbine avenue, alley between Columbine avenue and Murdock avenue, alley between Murdock avenue and Clayton avenue, alley between Clayton avenue and Fillmore avenue, alley between Fillmore avenue and Finley avenue, alley between Finley avenue and Clellan avenue, alley between Clellan avenue and Walnut street, alley between Estes and Legge streets, alley between Legge and Parsons streets, alley between Parsons and Stallcup streets, alley between Stallcup and Apple streets, alley between Apple and Banana streets, alley between Cherry and Damson streets, alley between Damson and Elder streets, alley

between Elder and Fruit Streets, alley between Fruit and Grape streets, alley between Grape and Hazel streets, alley between
63 Hazel and Lemon streets, alley between Lemon and Melon streets, alley between Melon and Orange streets, alley between Orange and Plum streets, and in, upon, along and through all extensions of said streets, avenues, alleys and public places, is hereby granted to The Denver Water Company, its successors and assigns, to such extent as the city may lawfully grant the same, subject to be terminated in the manner hereinafter in this ordinance provided.

SEC. 2. The city of Denver shall hereafter, whenever it shall be requested so to do, make a grant to such extent as it lawfully may to said The Denver Water Company, its successors and assigns, of the same rights mentioned in section 1 hereof in and upon any streets hereafter laid out or extended, and will also, whenever requsted, make such additional and confirmatory grants to said The Denver Water Company, its successors and assigns, of the rights and privileges mentioned in section 1 hereof, as it may at the time have the lawful right and power to make; all of such further additional and confirmatory grants, if made, to be subject to termination in the manner in this ordinance hereinafter specified.

SEC. 3. The Denver Water Company, its successors and assigns, shall at all times save and hold the city harmless of and from all loss, cost or damage to persons or property occasioned by any negligence in the excavation of any street, lane, alley or public place within the city, made by it in the laying of any of its mains, pipes, valves or other apparatus. And whenever the said The Denver Water Company, its successors or assigns, shall open, or cause to be opened, any street, lane, alley or other public place for lay-
64 ing any main, pipe, valve or hydrant, or other apparatus, it shall forthwith restore the same to as good condition as the same was in before any such opening, at its own expense; and in case of any failure so to do for a space of twenty-four hours after the laying of such main, pipe, hydrant, valve or other apparatus shall be completed, notice shall be given to the said company so to do by the officer, for the time being, having charge of the streets in said city; and in case of default for twenty-four hours after such notice the said street may be put in such order by the said city, but at the expense of the said company.

SEC. 4. The said The Denver Water Company shall at all times furnish water from its mains, through connections to be made by parties desiring the same, to premises abutting upon streets in which it may have a pipe laid, upon application of the owners of the same, under such rules as now prevail, and such further reasonable rules as it may prescribe, and to enable such owners to obtain such supply of water shall permit connection to be made with its mains and pipes, under its direction, and in such manner and subject to such conditions as it now permits the same.

SEC. 5. The rate to private consumers for water shall not be greater than now charged by the said The Denver Water Company, a schedule of which rates is hereto annexed, marked Schedule A, and the said The Denver Water Company may require any con-

sumer to furnish a meter and pay for water by meter measurement; Provided, however, That, at any time after five years from date, the city council may require said company to fix schedule
65 rates for private consumers equivalent to the average rate prevailing in the cities of Chicago, St. Louis and Cincinnati for the same service.

SEC. 6. The said The Denver Water Company shall at all times furnish water to the city and to private consumers, of a quality as good and fit for private consumption as that shown by the analysis made by order of the city of Denver by Professor Joseph A. Sewall in the month of August, 1889.

SEC. 7. The Denver Water Company hereby purchased of the city of Denver four hundred and ninety-three hydrants, now set upon its mains and owned by the city of Denver, for the sum of twenty-five thousand dollars, payable to the city treasurer within four months after the taking effect of this ordinance. And within one year after the taking effect of this ordinance the said The Denver Water Company shall replace all said hydrants with hydrants having two nozzles for hose and one for steamer connection, and with not less than a six-inch barrel. And within six months after this date the city council shall designate the location of so many additional hydrants, to be set upon the present lines of main of The Denver Water Company, as will bring the total number of hydrants upon the present line of main of the said company up to the number of one thousand. And within the said one year after the taking effect of this ordinance the said The Denver Water Company shall cause to be set in the said locations hydrants of the description last aforesaid, so that the number of hydrants upon its present lines of mains shall then be one thousand in number.

SEC. 8. The said company shall at all times, until the first day of May, 1891, keep and supply the said hydrants with an
66 abundant supply of water for fire purposes under such pressure as it now gives; and after said first day of May, 1891, shall supply all of said hydrants, and any hydrants which may be ordered to be set upon additional mains, as hereinafter in this ordinance mentioned, with a pressure equivalent, taking the elevation of the surface of the ground into account, to one hundred and fifteen pounds at the hydrant in front of the Union depot, in said city; Provided, The city shall not be in default with the company upon any of its agreements; and Provided, further, That if, owing to the extension and growth of the city, hydrants shall be ordered upon locations where, owing to the difference in elevation, there shall be less than forty-five pounds pressure, with a pressure of one hundred and fifteen pounds at the hydrant in front of the Union depot, to the number of fifty or more, the said company shall put such hydrants upon a separate high service, and keep and maintain on each of said hydrants a water pressure of not less than fifty pounds.

SEC. 9. The act of God, unavoidable accident, interference of rioters, or other unlawful disturbance, shall excuse any default by the company in the furnishing of any water in this ordinance provided to be furnished for the time being.

SEC. 10. Until the first day of May, 1891, the said city shall pay to The Denver Water Company, its successors and assigns, semi-annually, the sum of money mentioned in said contract between the city and the company of May 9, 1874, in full, for all water furnished to the said city for all purpose mentioned in said contract until the said first day of May, 1891, and during the re-
67 mainder of the period of twenty years from and after the date of the passage and approval of this ordinance the said city shall pay to the said The Denver Water Company, its successors and assigns, for fire purposes, as follows, viz.:

For the period of ten years from and after the first day of May, 1891, the sum of thirty-five dollars per hydrant per annum for all hydrants then set and in operation, and for the remaining period until the right of purchase shall accrue, as mentioned in section 11 hereof, the sum of twenty-five dollars per hydrant per annum for all hydrants then set and in operation. All payments by the city to be made semi-annually on the first days of May and November in each year during the period aforesaid, at the office of the city treasurer.

SEC. 11. At the expiration of the period of twenty years from and after the date of the passage and approval of the ordinance, in case the city shall then elect so to do, the said works may be purchased by the said city, and in case the parties can not agree, after such election, upon the price to be paid by the city for the water works of the said company, its successors and assigns, then their fair cash value shall be determined by arbitration, by five disinterested persons, none of whom shall be residents of Denver, two of them to be chosen by the city, two by the company, and the fifth by the four first chosen, and in case of failure on the part of the company to name arbitrators for the period of thirty days after the city shall have named arbitrators and notified the company so to do, the city may apply to any court having equity jurisdiction in the
68 county in which the city of Denver shall then be situated for the appointment of two persons of the qualifications aforesaid as such arbitrators, and the court may thereupon appoint two such persons, who shall act with the same force and effect as if appointed by the company, and the decision of a majority of said board shall be final and binding upon both parties, and upon the payment, or tender of payment, by said city the said company shall convey to said city all of its property, real or personal, easements, rights and privileges, and thereafter all franchises, rights and privileges which have been at any time theretofore granted said company, its successors or assigns, and which it may then possess, shall cease and be at an end.

SEC. 12. At the expiration of the said period of twenty years the said city may, at its election, renew the contracts hereby made, by ordinance to that effect, for a like period of twenty years, but at a price for hydrant rental 10 per cent. less than mentioned in section 10 hereof, for the period remaining after the ten years after May 1st, 1891, and for successive periods of twenty years at the price last aforesaid, as often and as long as the city may choose. This section

is conditioned, however, upon the full performance by the city of the provisions of section 2 hereof.

SEC. 13. The said company shall at all times after taking effect of this ordinance, whenever so ordered to do by ordinance duly passed, extend its mains upon any street upon which no main shall then be laid, and set fire hydrants thereon, for each of which the city shall pay to the said company, its successors and assigns, the
69 price per hydrant hereinbefore mentioned; Provided, however, That no such extension shall be ordered to be made, nor, if ordered, shall the same be of any binding effect, unless a fire hydrant is ordered for every four hundred feet of extension at least, or fractional part thereof; rent for such hydrants to accrue from and after the date when the city clerk shall be notified that the same are set and ready for use, and that the same rate per hydrant as is hereinbefore mentioned in section 10 hereof; Provided, however, That no such additional hydrants ordered and set before the first day of May, 1891, shall be entitled to any rental, except from the said last mentioned date, when the same shall begin to draw rental; and Provided, further, That no main laid by the said The Denver Water Company, after the passage and approval of this ordinance, shall be of less diameter than six inches.

SEC. 14. The said company, its successors and assigns, shall at all times during the existence of this contract, or any renewal thereof, furnish and supply to the city, water free of charge for use in the city hall and fire department houses; also for flushing sewers and gutters and for sprinkling purposes, through special hydrants to be set for that purpose, not exceeding four hundred in number, at such location- as they city council may determine; such last mentioned hydrants to be set and kept in order by the said company, its successors and assigns, and the hydrants purchased from the city under this ordinance may be used for that purpose.

To prevent controversy in regard to the manner and method of using water for the above purposes the same shall be used under rules and regulations to be adopted by the board provided in section 18 hereof.

70 SEC. 15. The fire hydrants provided for in this ordinance shall not be used for any other purpose than for fire purposes and testing; and the opening and closing of said hydrants shall be under the exclusive direction of the chief of the fire department and such persons as he may appoint, and the officers and agents of said company; and the opening and closing of sprinkling hydrants shall be under the direction of such officer as the city may designate; and the city shall be liable for any damage done to the said fire hydrants or said other hydrants by any officer or agent of the city. All fire hydrants and sprinkling hydrants shall be closed when not in actual necessary use and in times of fire the sprinkling hydrants shall not be used in any place to the detriment of the service from the fire hydrants. Nor shall the city suffer or permit undue waste of water from any of said sprinkling hydrants.

SEC. 16. The right of all persons under license from the said company, desiring to excavate the streets to connect with the mains

of said company, under such proper and reasonable rules as now prevail in said city, shall not be inhibited by the said city.

SEC. 17. The said company being charged with a public duty, the said city shall pass such ordinances as will prohibit all unlawful interference with the operations, pollution of its water supply, trespasses upon its property, and unauthorized use of hydrants.

SEC. 18. The said city and the said company shall presently, and on or before the first day of January of each third year, each appoint some competent person, and they two shall choose a third per-
71 son, to whom all complaints by either party against the other of any violation of the terms of this ordinance and contract, or any controversy as to the construction and meaning of the terms of this ordinance, and the framing, altering or amending rules governing the use of water for flushing sewers and gutters and sprinkling purposes, shall be referred. And the decision of a majority of said board shall be binding on both parties. In case either party shall neglect or refuse at any time to appoint any such arbitrator, and any complaint shall then be pending, the party guilty of such neglect or omission shall be deemed to admit the claim of the other; and in case the said two so chosen shall be unable for fifteen days to agree upon a third person, such third person may be appointed upon application of either party, by any court of general equity jurisdiction in the county in which the said city of Denver shall then be situated. The parties so chosen as above shall hold such positions for the period of three years, and until their successors shall be chosen and qualified.

SEC. 19. This ordinance, when the same shall be in writing accepted by The Denver Water Company, becomes a contract between the city of Denver and the said The Denver Water Company, its successors and assigns, and the same shall as to every provision herein contained as fully bind and inure to the benefit of the successors and assigns of the said The Denver Water Company as to the said company. And it is expressly understood that by the acceptance of this ordinance the said The Denver Water Company loses no rights in regard to the occupation of the streets, alleys and public
72 places, or as to the rights of any other person or persons thereto which it now possesses, but the same are hereby recognized and confirmed and are to be deemed independent of and not merged in any grant in this ordinance elsewhere contained.

SEC. 20. All mains, pipes, valves and other apparatus now owned by said The Denver Water Company, and composing its plant, and all such mains, pipes, valves, hydrants and other apparatus as said The Denver Water Company, its successors or assigns, shall hereafter lay down or set in or upon any of the streets, alleys or other public places within said city shall be and remain the sole and absolute property of said The Denver Water Company, its successors and assigns, and the said The Denver Water Company, its successors or assigns, shall forever be considered and entitled to be in possession thereof, except in case of purchase by said city under the terms of this ordinance, or some agreement between said city and said company, its successors or assigns, when all rights of whatsoever nature

of said company, its successors or assigns, in and to the subject-matter hereof shall vest in said city.

SEC. 21. While the consideration for the respective agreements of the city and the company are upon each side the several agreements of the other, all of the several grants, contracts and agreements in this ordinance contained are to be deemed independent agreements with the same force and effect as if each section of this ordinance was contained in a separate ordinance by itself.

73 SEC. 22. This ordinance shall take effect and be in force from and after its passage.

Passed April 10, 1890.

NOTE.—For Schedule A, see pages below.

SCHEDULE A.

Water Rates of the Denver Water Company, 1890.

Schedule of yearly water rates, payable semi-annually in advance, on the first days of May and November of each year, at the office of the company:

Alcohol, each barrel manufactured			$.10
Ale cellar, from	$20.00	to	50.00
Bakery, each oven, from	10.00	to	50.00
Barber shop, first chair			10.00
Barber shop, each additional chair			3.00
Bath, private, with heating apparatus			5.00
Bath, private, without heating apparatus			3.00
Bath, in boarding or tenement house			5.00
Bath, public, not less than			15.00
Beer, for each barrel brewed			.05
Beer house, from	20.00	to	50.00
Billiard saloon, each table			3.00
Boarding house, per room			1.50
But no license less than			10.00
Book bindery, not less than			10.00
Brick work, per thousand			.10
74 Brick yard, each gang of hands			20.00
Camphine, each barrel manufactured			.10
Candle manufactory, from	100.00	to	1,000.00
Candy manufactory, from	15.00	to	75.00
Church	5.00	to	15.00
Church, Baptist, for baptistry	5.00	to	15.00
Cigar manufactory, per hand			2.00
But no license less than			15.00
Club room	30.00	to	100.00
Coffee saloon	15.00	to	30.00
Confectionery	15.00	to	75.00
Cow			1.00
Distillery, for each barrel distilled			.10
Dramshop	25.00	to	100.00

Dyeing and scouring	25.00	to	100.00
Forage			3.00
Fountain for six months, running not more than four hours per day, viz.:			
1 opening 1-16 inch diameter			22.50
1 opening ⅛ inch diameter			40.00
1 opening 3-16 inch diameter			52.50
1 opening ¼ inch diameter			67.50
1 opening 5-16 inch diameter			82.50
1 opening ⅜ inch diameter			97.50
1 opening 7-16 inch diameter			112.50
1 opening ½ inch diameter			150.00
Hall	5.00	to	30.00
Hat manufactory	30.00	to	100.00
Hose, in private stables			3.00
Hose, for private stable, not less than			5.00
75 Hose, for livery or sale stable, not less than			50.00
Hose, for sprinkling sidewalks and washing windows, per foot run			.20
Hotel, per room			1.50
Ice cream saloon, from	15.00	to	50.00
Laboratory	20.00	to	200.00
Laundry	20.00	to	300.00
Livery stable, per stall			2.00
Malting, per bushel			.01
Office	5.00	to	30.00
Oyster saloon	15.00	to	30.00
Packing house	40.00	to	500.00
Photograph gallery	20.00	to	40.00
Plastering, per square yard			.01½
Porter cellar	20.00	to	50.00
Rectifying whiskey, per barrel			.03
Residence occupied by one family only—			
1 to 4 rooms			5.00
5 or 6 rooms			6.00
7 or 8 rooms			7.00
9 or 10 rooms			8.00
11 or 12 rooms			9.00
13 or 14 rooms			10.00
15 or 16 rooms			11.00
17 or 18 rooms			12.00
19 or 20 rooms			13.00
Of 10 or more rooms used as a boarding house, per room			1.50
Sale stable, per stall			2.00
76 School, for every scholar			.20
Shop from	5.00	to	30.00
Slaughter house	25.00	to	500.00
Soap manufactory	100.00	to	1,000.00
Soda manufactory	40.00	to	300.00

Spirit gas, for each barrel manufactured		.10
Sprinkling street, for that portion of street embraced between two cross streets		15.00
Sprinkling street with hose, including sidewalks, per foot run		.20
Starch manufactory	50.00 to	200.00
Steam boilers, per square foot of fire surface, not less than		.40
But no license less than		25.00
Stock yard	25.00 to	500.00
Stone work, per perch		.05
Store	10.00 to	300.00
Sugar refinery	300.00 to	3,000.00
Tannery, per vat		6.00
But no license less than		25.00
Tenement, per room		1.50
But no license less than		10.00
Tobacco manufactory, per hand		2.00
But no license less than		15.00
Urinal basin	10.00 to	40.00
Vault, for residence		5.00
Vault, accommodating double house, each house		3.00
Vault for tenement or boarding house, for every 15 rooms		5.00
77 Vault, bar		5.00
Vehicle	.00 to	2.00
Vinegar, for each barrel manufactured		.05
Washing bottles	5.00 to	20.00
Washing bottles, per barrel		.05
Washing meat	50.00 to	500.00
Water closet, private		5.00
Water closet, hotel		10.00
Wine cellar	20.00 to	50.00
Restaurant	25.00 to	100.00

Special Rates Adopted by This Company.

Irrigation of lots only through hose, with nozzle 40 cents per front foot. No license for irrigation will be issued for less than the season rate. Water for irrigation must not be used except within the hours specified on the license, nor during a fire or conflagration. Any violation of this rule will subject the license to forfeiture.

For fountain in drug store, six months, opening not to exceed ⅛ inch in diameter	$50.00
For tumbler washer in drug store, six months	50.00

Water used for elevators, motors or manufacturing purposes at the following rates, payable monthly:

When the quantity used per day is from 1,000 to 5,000 gallons, per 1,000 gallons ..... $.20
5,000 to 25,000 gallons per day, per 1,000 gallons..... .15
Provided that the rate for any month shall not be less than.. 6.00

78 Where water is paid for all purposes on premises there will be no additional charge for a standpipe for fire protection. Where The Denver Water Company's water is not used, a special rate will be made for such standpipes.

The water company reserves the right to require any customer to furnish a meter and pay for water by meter measurement. In any case before a meter is placed a satisfactory rate must be established or agreed upon.

Approved April 10, 1890.

79 "EXHIBIT B."

(Mortgage: The Denver Union Water Company to Continental Trust Company of the City of New York.)

This indenture, made and entered into this 20th day of October, A. D. 1894, by and between The Denver Union Water Company, a corporation organized under the laws of the State of Colorado and having its principal office in the City of Denver, Colorado, hereinafter, for brevity's sake, called "The Company," party of the first part, and "Continental Trust Company of the City of New York," a corporation organized under the laws of the State of New York, having its principal office in the City of New York, hereinafter, for brevity's sake, called "The Trustee," as Trustee, party of the second part:

Witnesseth:

Whereas, The Denver Union Water Company, said first party, is a corporation organized under the laws of the State of Colorado, for the purpose, among other things, of supplying water to the City of Denver, the towns of Highlands, Barnum, Elyria, Montclair and Harman, and unincorporated territory in the County of Arapahoe, adjacent to said city and towns, or some of them, or near thereto, and the inhabitants thereof; and,

Whereas, the said first party has purchased the property and works which were formerly owned by The Denver Water Company, The Denver City Water Works Company, The American Water Works Company, and the Citizens Water Company, by which
80 water has been, and is, supplied to the City of Denver, and its inhabitants, and to the towns of Montclair, Elyria, Harman Highlands and Barnum, and their respective inhabitants, and to territory adjacent and near to said city, and said towns, or some one or more of them; and,

Whereas, the said first party, as a part of the purchase price of said works and property, finds it necessary to borrow the sum of seven millions of dollars ($7,000,000), and may find it necessary to borrow further sums in the future for the purpose of enlarging and improving its works and plant, and the acquisition of additional property; and,

Whereas, the said first party is authorized by law to borrow money and contract debts without limit; and,

Whereas, the power of contracting debts and borrowing money by the said, The Denver Union Water Company, the first party hereto, is vested in the Board of Directors thereof, and the said Board of Directors is authorized so, as aforesaid, to borrow money and contract debts in its name and make, execute and deliver its obligations therefor; and it is further authorized to secure such indebtedness on its property, by mortgage or deed of trust, and pledge its property, income and resources for the payment thereof, and as security therefor, and,

Whereas, to accomplish the purposes aforesaid, the Board of Directors of said The Denver Union Water Company, at a meeting thereof duly and lawfully assembled on the 19th day of October, A. D. 1894, at the office of said Company in the City of Denver, Colorado, unanimously adopted the following resolutions, viz:

81 Resolved, that this Company make, issue and deliver its negotiable bonds to the amount of eight millions of dollars ($8,000,000), consisting of seven thousand five hundred (7,500) bonds, each of the denomination of one thousand dollars ($1,000), numbered consecutively from No. one (1) to No. seven thousand five hundred (7,500), both inclusive, and nine hundred (900) bonds of five hundred dollars each, numbered consecutively from No. A one (A 1) to No. A. nine hundred (A 900), both inclusive, and five hundred bonds of one hundred dollars each, numbered consecutively from No. B one (B 1) to No. B five hundred (B 500), both inclusive, bearing date October 20th, 1894, and becoming due and payable July 1st, 1914, bearing interest at the rate of five (5) per cent. per annum from July 1st, 1894, payable semi-annually, according to forty (40) coupons to be annexed to each of said bonds, each coupon being for the payment of one semi-annual installment of interest on said bonds, both principal and interest payable in gold coin of the United States, of the present standard of weight and fineness, at the fiscal agency of said first party, in the City of New York, New York.

Resolved, that said principal and interest mentioned in said bonds shall be payable without deduction of any tax whatsoever which said Company, its successors or assigns, is, or may be hereafter required by any law of the United States, or of the State of Colorado, to retain therefrom; but that the said Company, its successors and assigns, shall pay such tax without deducting the same from either the principal or interest of said bonds.

82 Resolved, that this Company, its successors and assigns, shall retain the right to redeem $500,000 of said bonds at any time when any semi-annual installment of interest shall become due, at the price of one hundred and five (105) per cent. of the principal thereof, and that thereupon said $500,000 of said bonds, or such amount of the same as shall at any time be redeemed, shall be cancelled so as to be incapable of further negotiation, and shall thereby be deemed to be paid off, satisfied and discharged. That such bonds shall be called for redemption under such provisions as may be inserted in the mortgage securing the same.

Resolved, that this Company, its successors and assigns, shall have the right to redeem all of said bonds at the price of the principal, together with the accrued interest thereon, at any time during the year beginning with April 10, 1910, and ending April 9, 1911; but that if said bonds shall not be redeemed within said year, at the price aforesaid, the right of redemption of said bonds shall cease and be at an end until the maturity thereof.

Resolved, that said bonds shall be of such form and such tenor and effect as to the President and Secretary of this Company shall seem best, providing the same shall be in accordance with the terms of these resolutions; but may contain such other and further recitals, covenants, agreements, conditions and stipulations as are not in contravention of anything in these resolutions expressly contained.

Resolved, that The "Continental Trust Company of the City of New York," a corporation organized under the laws of the State of New York, be appointed trustee under all the trusts in connec-
83 tion with the said bonds and the mortgage securing the same.

Resolved, that six thousand five hundred (6,500) of said bonds of one thousand dollars each, numbered consecutively from No. one (1) to No. six thousand five hundred (6,500) both inclusive, and the nine hundred (900) of said bonds of five hundred dollars ($500) each, and the five hundred (500) of said bonds of one hundred dollars ($100) each, amounting altogether to seven millions of dollars, be delivered by said Trustee, the "Continental Trust Company of the City of New York," on the order or orders of the President and Secretary of this Company, attested by its corporate seal.

Resolved, that one thousand of said bonds of one thousand dollars ($1,000) each, being bonds numbered consecutively from No. 6,501 to number 7,500, both inclusive, shall be deposited in the treasury of the first party without certificate of the trustee endorsed thereon, for the purpose of future certification, sale and delivery, to raise money with which to pay for the improvement, extension and enlargement of the works of this Company, the erection or acquisition of additional works and property, and that whenever any application shall be made to said trustee for the certification and delivery of any of said bonds there shall be presented to the said trustee the written order of said The Denver Union Water Company, its successors or assigns, executed by the President and Secretary thereof and under its corporate seal, specifying the number of said bonds applied for to be certified and delivered and the name of the person or persons to whom the same shall be delivered, together with so many of said bonds as are specified in such order duly executed by the
84 President and Secretary of the Company and under its corporate seal, and if upon such application being made to said trustee for the certification and delivery of any of said last mentioned 1,000 bonds so remaining in the treasury as aforesaid, there shall be presented to the said trustee the written statement of the President and Secretary of said The Denver Union Water Company, its successors or assigns, under the seal of the corporation, setting forth first, the resolution of the Board of Directors authorizing the certification

and delivery of said bonds and the making of the order therefor; second, the purpose for which said bonds or the proceeds thereof are to be used, and if upon such application there shall be endorsed the approval of the committee representing holders of the bonds already outstanding, viz: George Coppell, Edward E. Poor, James B. Grant, David H. Moffat and Walter S. Cheesman, their successors in office or a majority of them, the said trustee shall endorse its certificate upon the bonds so presented with such application and specified in said order and shall deliver the same as certified to the person or persons mentioned in said order.

Resolved, that the Treasurer of this company shall, as often as a semi-annual payment of interest becomes due on said bonds, cut off, deface and cancel the coupons then respectively falling due, attached to all of said bonds, numbered from 6,501 to 7,500, both inclusive, remaining in the treasury, and which have not been certified or delivered upon the order of said The Denver Union Water Company, its successors or assigns, so that none of said bonds shall be delivered with any past due coupons attached thereto.

85 Resolved, that to secure the payment of said eight thousand nine hundred (8,900) bonds, or so many of the same as shall be at any time outstanding without preference or priority, interest and principal, this Company make, execute and deliver to the "Continental Trust Company of the City of New York," the said Trustee above named, a mortgage of all its works, plant, property, real and personal, franchises, rights, privileges, mains, pipes, choses in action and assets of every description wheresoever situated, of whatsoever kind or character the same may be, and of all rents, dues and demands from the City of Denver, or other corporations, municipal or private, or from private consumers, and of all plant, property, real and personal, franchises, rights, privileges, mains, pipes, choses in action and assets of every description, wheresoever situated, or of whatsoever kind or character, which the said The Denver Union Water Company, its successors and assigns, may hereafter acquire within the scope of its or their corporate purposes, or in anywise connected with, operated by or with the property now owned or afterwards acquired by said Company, its successors and assigns, excepting and excluding from the grants in said mortgage to be contained all that property conveyed or to be conveyed by the Citizens' Water Company and William A. Underwood to David H. Moffat and James B. Grant as Trustees, and that such mortgage or deed of trust shall be in such form and with such recitals, covenants, agreements, conditions and stipulations as to the said President and Secretary of this Company shall seem best: Provided, that nothing in said mortgage or deed of trust contained shall be in contra-

86 vention of anything in these resolutions expressly contained, but otherwise at the discretion of the President and Secretary of this Company; and that all the provisions of said mortgage shall be construed in favor of the promises, agreements, grants, covenants and stipulations contained in said bonds and said mortgage to give the same the widest construction in favor of the holders of said bonds, and the grantee in said mortgage.

Resolved, that the President and Secretary of this Company are hereby authorized and directed to execute the said bonds and mortgage in the name of this Company and to affix the corporate seal of this Company thereto, and when said bonds and said mortgage shall be executed by said President and Secretary, in the name of this Company, under its seal, they shall be the bonds and mortgage of this Company, and such execution thereof shall be evidence in all courts and places of the approval of this Company of the terms of said bonds and mortgages, and of their due execution and delivery by this corporation; and,

Whereas, on the said 19th day of October, A. D., 1894, at a meeting of the stockholders of said party of the first part, duly and lawfully assembled, on the day and year last aforesaid, at the office of said company, in the City of Denver, Colorado, at which there was present the holders of the entire capital stock of said Company, and at which meeting the foregoing reasolutions of the Board of Directors were laid before and submitted to the stockholders of said Company, the following resolutions were unanimously adopted, viz:

Resolved, that the stockholders of this Company hereby ap-
87 prove, ratify and confirm the resolutions of the Board of Directors, adopted October 19th, 1894, this day submitted to this meeting authorizing the issue of seven thousand five hundred (7,500) bonds of one thousand dollars ($1,000) each, and nine hundred (900) bonds of five hundred dollars ($500) each, and five hundred (500) bonds of one hundred dollars ($100) each, secured by a mortgage on all the property of this Company, both that which it now owns, and that which it may hereafter acquire; and, excepting and excluding from the grants in said mortgage to be contained, all that property conveyed or to be conveyed by The Citizens' Water Company and William A. Underwood to David H. Moffat and James B. Grant, as Trustees; and,

Whereas, the said The Denver Union Water Company, in pursuance of its lawful right and authority, and of said resolutions, has made and executed its seven thousand five hundred (7,500) negotiable bonds of the sum of one thousand dollars ($1,000) each, of the form, tenor and effect following, that is to say:

UNITED STATES OF AMERICA,
City of Denver, State of Colorado:

The Denver Union Water Company.

First Mortgage Five Per Cent. Gold Bond.

$1000. No. ——.

On the first day of July A. D. 1914, for value received, The Denver Union Water Company, which is a corporation organized under the laws of the State of Colorado, promises to pay the bearer hereof

One Thousand Dollars, in United States Gold Coin, of the
88 present standard of weight and fineness, with interest thereon at the rate of five per cent. per annum, payable semi-an-

nually, on the first days of January and July, in each year, in like gold coin, according to the coupons hereto annexed, both principal and interest payable at the fiscal agency of The Denver Union Water Company in the City of New York. The principal and interest mentioned in this bond is each payable without deduction of any tax whatsoever, which said Company, its successors or assigns, is, or may be hereafter, required by any law of the United States or the State of Colorado to retain therefrom; the said Company, its successors and assigns, hereby agreeing to pay the same without deduction from the principal or interest of said bond. This bond is one of an issue of Seven Thousand Five Hundred bonds of like date, tenor and amount, numbered consecutively from number One to number Seventy-five Hundred, both inclusive, and Nine Hundred (900) bonds of Five Hundred Dollars each, numbered from No. A. One (A.1) to number A. Nine Hundred (A.900), both inclusive, and Five Hundred (500) bonds of One Hundred Dollars ($100) each, numbered consecutively from number B. One (B.1) to number B. Five Hundred (B.500), both inclusive, of like date and tenor, except the amount thereof, the whole issue aggregating Eight Millions of Dollars, all equally secured by a first mortgage, executed by The Denver Union Water Company to the "Continental Trust Company of the City of New York," Trustee, One Thousand of which bonds of One Thousand Dollars ($1,000) each, being bonds numbered from Number Six Thousand Five Hundred and One (6,501)
89 to Number Seven Thousand Five Hundred (7,500) both inclusive, are retained in the treasury of the Company to provide for future improvements, enlargements and extensions of the property of this Company, and the erection and acquisition of further works and property for its use.

The Denver Union Water Company, for itself, its successors and assigns, reserves the right to pay off and redeem Five Hundred Thousand Dollars of said bonds, or any part thereof at any time when any semi-annual installment of interest on the same shall fall due at the price of One Hundred and Five (105) per cent. of the par value thereof.

The provisions for the calling of said bonds for redemption are contained in the mortgage or deed of trust, and reference thereto is hereby made for the full particulars thereof.

The said obligor Company, or its successors or assigns, also reserves the right and privilege to pay off and redeem all of said issue of bonds which may be outstanding at any time during the year beginning April 10th, 1910, and ending April 9th, 1911, at the price of the par value thereof, and the accrued interest thereon, upon the said Trustee giving thirty days notice, by publication in two or more daily newspapers of general circulation, published in the City of New York, N. Y., of the date of such redemption, after which date in case of such call, interest on this bond will cease.

This bond shall not be valid until the execution by the said "Continental Trust Company of the City of New York" of the Trustee's Certificate hereon endorsed.

The facsimile of the signature of the Treasurer, written,
90 printed or engraved on each of the coupons attached hereto shall, upon the execution of the bond, be sufficient execution of each of said coupons.

It is agreed between the said obligor and the holder of this bond that in case of any default in the payment of the principal or interest thereof, the said obligor, its successor and assigns, will waive, and does hereby waive, the benefit of any exemption, valuation, stay, redemption or appraisement laws now existing or which may be hereafter enacted.

In Witness Whereof, the said The Denver Union Water Company has caused this bond to be executed by its President, and countersigned by its Secretary, and its corporate seal to be hereto affixed this 20th day of October, A. D., 1894.

THE DENVER UNION WATER COMPANY,
By —— ——, *President.*

Countersigned,
—— ——, *Secretary.*

[SEAL.]

Coupon.

To each of said bonds of One Thousand Dollars each, Forty (40) coupons are attached, of form, tenor and effect following, that is to say:

$25.00. No. —.

On the first day of —— The Denver Union Water Company will pay to the bearer Twenty-five Dollars in United States Gold
91 Coin, of the present standard of weight and fineness, at its fiscal agency in the City of New York, New York, for semi-annual interest then due on bond No. —.

—— ——, *Treasurer.*

And upon each of said bonds, previous to the delivery thereof, a certificate shall be endorsed by the said Continental Trust Company of the City of New York, of the form, tenor and effect following, that is to say:

Trustee's Certificate.

This bond is one of the series of bonds described in the trust mortgage within mentioned.

—— ——, *Trustee,*
By —— ——, *President.*

Of which seven thousand five hundred (7,500) bonds, six thousand five hundred (6,500) have been delivered to the "Continental Trust Company of the City of New York," the second party hereto, for certification and delivery, upon the order of the said The Denver Union Water Company. One thousand of said bonds, duly executed

by The Denver Union Water Company by its President and Secretary under its corporate seal, are retained in the treasury of said The Denver Union Water Company for future certification and delivery, as hereinafter secondly mentioned.

92 And Whereas, the said The Denver Union Water Company, in pursuance of its lawful right and authority, and of said resolutions, has made, executed and delivered its nine hundred (900) negotiable bonds of five hundred dollars ($500) each, of substantially like form, tenor and effect as the said seven thousand five hundred (7,500) bonds of one thousand dollars ($1,000) each, except in the amount of each bond, numbered consecutively from No. A one (A1) to No. A nine hundred (A900), both inclusive, and with like coupons, except as to the amount thereof, each of the coupons of said last mentioned bonds being for twelve and fifty one-hundredths dollars ($12.50), instead of twenty-five dollars ($25), and with a like form of Trustee's certificate endorsed thereon; and,

Whereas, the said The Denver Union Water Company, in pursuance of its lawful right and authority, and of said resolutions, has made, executed and delivered its five hundred (500) negotiable bonds of one hundred dollars ($100) each, of substantially like form, tenor and effect as the said seventy-five hundred (7,500) bonds of one thousand dollars ($1,000) each, except in the amount of each bond, numbered consecutively from No. B one (B1) to No. B five hundred (B500), both inclusive, and with like coupons except as to the amount thereof, each of the coupons of said last mentioned five hundred (500) bonds being for two and fifty one-hundredths dollars ($2.50) instead of twenty-five dollars ($25), and with a like form of Trustee's certificate endorsed thereon.

All of which seven thousand nine hundred bonds have been delivered to the said "Continental Trust Company of the City of New York," subject to the following conditions:

93 First. Bonds for one thousand dollars ($1,000) each, consecutively numbered from No. one (1) to No. six thousand five hundred (6,500), both inclusive, and bonds for five hundred dollars ($500) each, numbered from No. A one (A 1) to No. A nine hundred (A 900), both inclusive, and bonds for one hundred dollars ($100) each, numbered from No. B one (B 1) to No. B five hundred (B 500), both inclusive, shall be delivered at any time on the order or orders of the President and Secretary of the said The Denver Union Water Company, its successors or assigns, attested by its corporate seal, and whenever any such order of said first party so executed for the delivery of any of said seven thousand nine hundred (7,900) bonds, in this clause mentioned, shall be presented to said second party, its successor or successors in the trust, the said second party shall deliver the number of bonds mentioned in said order to the person or persons therein mentioned, and to his or their order, retaining such order as its voucher for the delivery of said bonds.

Second. Bonds for one thousand dollars ($1,000) each, consecutively numbered from number six thousand five hundred and

one (6,501) to number seven thousand five hundred (7,500), both inclusive, shall be retained in the treasury of said The Denver Union Water Company, executed by said The Denver Union Water Company by its President and Secretary under its corporate seal, but without the certificate of the Trustee endorsed thereon, for the purpose of sale and delivery subsequent to the date of this mortgage to raise money with which to pay for improvement, extension and enlargement of the works of this Company and the
94 erection or acquisition of additional works and property, and said one thousand (1,000) bonds in this clause mentioned shall be delivered by said The Denver Union Water Company and certified by the said Trustee only in the following manner, viz: whenever any application shall be made to said Trustee by said The Denver Union Water Company for a certification and delivery of any of said last mentioned one thousand (1,000) bonds, there shall be presented to the said Trustee the written order of said The Denver Union Water Company, its successors or assigns, executed by the President and Secretary thereof and under its corporate seal, specifying the number of said bonds applied for to be certified and delivered and the name of the person or persons to whom the same shall be delivered, together with so many of said bonds as are specified in said order duly executed by the President and Secretary of said The Denver Union Water Company and under its corporate seal; and if upon such application being made to said Trustee for a certification and delivery of any of said last mentioned one thousand (1,000) bonds so remaining in the treasury as aforesaid, there shall be presented to the said Trustee the written statement of the President and Secretary of said The Denver Union Water Company, its successors and assigns, under the seal of the corporation, setting forth, first, the resolution of the Board of Directors authorizing the certification and delivery of said bonds and the making of the order therefor, and second, the purpose for which the said bonds or the proceeds thereof are to be used; and if upon such application there shall be endorsed the approval of the committee representing the holders of the bonds already outstanding,
95 namely, George Coppell, Edward E. Poor, James B. Grant, David H. Moffat and Walter S. Cheesman, their successors in office or a majority of them, the said Trustee shall endorse its certificate upon the bonds so presented with such application as specified in said order and shall deliver the same so certified to the person or persons mentioned in said order.

Third. In case the said The Denver Union Water Company shall sell, assign or convey its property to another corporation, and it shall be desired that said corporation, assignee, shall be substituted for said The Denver Union Water Company in the certification and delivery of any of said one thousand (1,000) bonds so remaining in the treasury under the terms of this instrument, the said The Denver Union Water Company shall deliver said bonds to such assignee or grantee, and shall make, execute and deliver to the said second party hereto, the said Trustee, a certificate under its corporate seal and executed by its President and Secretary, in which it shall be stated that such conveyance has been made, and that the

said assignee, naming it, is substituted in the place of said The Denver Union Water Company, as to all trusts in this instrument contained, with reference to said one thousand (1,000) bonds or the part thereof so remaining in the treasury, and the certification and delivery thereof; and thereupon the said assignee named in said instrument shall be taken and deemed to be substituted in the place of the said The Denver Union Water Company as to all of the trusts in this clause mentioned, and shall be entitled to have certified and delivered any or all of said one thousand (1,000) bonds for the same purposes, in the same manner and under
96 the same conditions as are in this instrument expressed, for the certification and delivery of said bonds, or any part thereof, at the instance of the said The Denver Union Water Company, and any such certificate and application made by the President and Secretary of such assignee, if a corporation, shall have the same force and effect as to the certification and delivery of said one thousand (1,000) bonds, or any part thereof, as if made by The Denver Union Water Company, or its President and Secretary.

Fourth. While any of the said eight thousand nine hundred (8,900) bonds shall remain in the custody of the said Trustee or in the treasury of the Company the same shall not be considered to be outstanding or negotiated, but upon the delivery by the said Trustee and the endorsement of the said Trustee's certificate thereon, all bonds so delivered and endorsed shall be deemed to be outstanding and negotiated, to be paid with pro rata equality with all other bonds of said eight thousand nine hundred (8,900) which shall be outstanding and negotiated, and be entitled to the equal pro rata benefit of all the provisions of this instrument.

Fifth. Whenever any of said eight thousand nine hundred (8,900) bonds secured by this instrument, shall be delivered by said Trustee, the said Trustee shall endorse upon each of said bonds delivered by it, the Trustee's certificate aforesaid.

Sixth. Before delivering any of the said eight thousand nine hundred (8,900) bonds secured by this mortgage, the said Trustee shall cut off, cancel and deface any and all past due coupons thereon, so that no bonds of said Company shall be delivered or suffered to be outstanding with any coupons then at the
97 time of the respective deliveries thereof past due attached thereto, such past due coupons so cut off and cancelled, to be returned to the first party, upon the delivery of the bonds.

Before delivering any of said one thousand (1,000) bonds, so to remain in the treasury of the Company, the Treasurer of said Company shall cut off, deface and cancel all past due coupons thereon, so that no part of said one thousand (1,000) bonds shall be delivered or suffered to be outstanding with any past due coupons attached thereto, and the Trustee shall not certify or deliver any of said bonds unless such coupons have been cut off, defaced and cancelled.

Now, therefore, Know All Men by These Presents, that The Denver Union Water Company, party of the first part, in pursuance of and by authority of law, and of the said proceedings and resolutions of the Board of Directors hereinbefore set forth, as con-

firmed by the stockholders, in order to secure the payment of the principal and interest of the bonds above described, with pro rata equality, and in consideration of the premises, and of the sum of one dollar to it in hand paid by the "Continental Trust Company of the City of New York," the said party of the second part, the said Trustee, the receipt whereof is hereby confessed and acknowledged, and for the purpose of securing the payment to the holders of so many of said bonds as shall be negotiated and sold, or shall be at any time outstanding, with pro rata equality, principal and interest, hath granted, bargained, sold, released, remised, enfeoffed, conveyed and confirmed, and by these presents doth grant,
98 bargain, sell, release, remise, enfeoff, convey and confirm unto the said party of the second part, its successors and assigns, as such Trustee, for the uses and purposes, and subject to the conditions and trusts hereinbefore and hereinafter expressed, all its privileges, franchises, easements, choses in action, estate, property, real and personal, water works, pipes, mains, valves, hydrants and other apparatus, and all extensions and enlargements thereof, improvements thereto, and all tools, implements, effects and assets, which the said party of the first part now has, whether or not the same be mentioned herein, among which are the following, that is to say:

All the property, of every kind and nature, mentioned and described in two certain deeds, both bearing date the 19th day of October, 1894; one made by The Citizens Water Company to The Denver Union Water Company, recorded in the records of Arapahoe County, Colorado, in Book 1020, at page 276, and the other of said two deeds, made by William A. Underwood, of the City of New York, to said The Denver Union Water Company, and recorded in the records of Arapahoe County, in Book 1020, at page 265.

Excepting and excluding from the grants herein contained all that certain real estate which was, on the 19th day of October, 1894, conveyed by two certain deeds, one made by William A. Underwood, of the first part; David H. Moffat and James B. Grant, as Trustees, of the second part; The Denver Union Water Company, of the third part, and Continental Trust Company, of the City of New York, of the fourth part; and the other of the said deeds made by The Citizens Water Company, of the first part; David
99 H. Moffat and James B. Grant, as Trustees, of the second part; The Denver Union Water Company, of the third part, and Continental Trust Company, of the City of New York, of the fourth part. And the said first party hath granted, bargained, sold, released, remised, enfeoffed, conveyed and confirmed, and by these presents doth grant, bargain, sell, release, remise, enfeoff, convey and confirm unto the second party, all rentals, debts, dues, demands, choses in action of every kind and nature, including water rents, from the City of Denver, the town of Barnum, the town of Highlands, the town of Montclair, the town of Elyria and the town of Harman, in and by virtue of any contract or contracts, resolution or resolutions, ordinance or ordinances of said city, or either of said towns now in force, or which may be hereafter in force, or in or by virtue of any contract, resolution or ordinance between said

city and all or either of said towns, or any town, or between said Company, its successors or assigns, and any other town or city which may now or at any time in the future enure to the benefit of the said first party or its assigns, and the water rents of any consumers wheresoever situated, and all water rents of any kind whatsoever, and also all the estate, privileges, franchises, easements, choses in action, property, real and personal, effects and assets which the said first party, its successors and assigns, may at any time hereafter during the existence of this instrument and the lien thereof, acquire at any place whatsoever, for any purpose for which the said corporation, its successors or assigns, shall be authorized by its or their articles of incorporation or charter to own, have, possess or acquire.

100 To Have and To Hold the said rights, privileges, easements, choses in action, property, real and personal, estate, effects and assets, both that which the said first party now has, or which may be hereafter acquired by it, and its successors and assigns, to the said party of the second part, its successors and assigns, as Trustee.

In Trust, Nevertheless, and subject to the following stipulations, covenants and agreements, that is to say:

This mortgage is given for the purpose of securing the payment of—

(A) The interest on such of said bonds as shall be at any time during the continuance of the lien of this mortgage outstanding.

(B) The principal of such of said eight thousand nine hundred (8,900), bonds heretofore described, as shall be outstanding at any time during the continuance of the lien of this instrument according to the provisions contained in said coupons and bonds respectively, pro rata, and without preference or priority between different bonds, (it being understood that the lien of this instrument is to secure the payment of all interest on any of said bonds in full, prior to the payment of any principal except as hereinafter stated) the payments which may be made said bondholders by the Trustee or by any Receiver or officer acting as Master in Chancery, or in case of foreclosure however the money shall come to the said Trustee, Master or Receiver, shall be made pro rata, first to pay said interest, and second, said principal, without preference or priority between bonds, and each of said bonds which may at any time be outstanding and negotiated, shall be deemed to be equally

101 secured by this instrument, and all conveyances, mortgages and deeds of trust supplementary thereto.

The stipulations, covenants and agreements to which the above conveyance is subject as mentioned above, are as follows:

First. So long as the first party shall observe, do, keep and perform all and singular the promises, agreements, covenants and stipulations in said bonds and coupons and in this mortgage contained, and shall well and truly pay or cause to be paid the interest and principal of the debt evidenced and promised to be paid by said bonds and coupons, at the time, in the manner and at the place therein mentioned for the payment thereof, it, the said first party,

many retain possession, use and enjoyment of all the mortgaged rights, franchises, privileges, easements, estate, choses in action, property, real and personal, rentals, incomes, effects and assets, without let or hindrance from the second party.

Second. In case the said first party shall pay the interest on said bonds as the same becomes due and payable, at the times and in the manner and at the place the same is payable, according to the terms of said bonds and coupons, and shall well and truly pay the principal of said bonds at the time, in the manner and at the place for the payment thereof, according to the terms of said bonds, and shall, upon demand, pay all proper and reasonable expenses of administering the trusts herein contained, and shall, during the continuance of the lien of this mortgage, observe, do, keep and perform all the covenants, agreements and stipulations herein contained, and all things to be by it observed, done, kept and performed ac-
102 cording to the terms of said bonds, coupons, and this mortgage, then the said party of the second part shall cause this mortgage to be released and discharged (but at the expense of the first party) and all the mortgaged rights, privileges, franchises, easements, choses in action, property, estate, effects and assets shall be released from the operation of the same, and thereupon this mortgage shall cease to be of any force, virtue or effect whatever.

Third. But should the first party at any time make default in the payment of the interest on said bonds or any installment or part of any installment thereof, at the time, in the manner, or at the place when and where said interest or any installment or part thereof shall be due and payable according to the terms of said bonds and coupons, or should the said first party make any default or neglect, or refuse, or in any manner fail to observe, do keep and perform all and singular each and every covenant, promise, agreement and stipulation in said bonds and coupons and in this mortgage contained, and by it to be observed, done, kept and performed, then the said second party shall, on the written request of the holders of thirty per cent. in amount of the bonds outstanding, in case such default, neglect, refusal or failure shall have continued for the period of four months after demand or notice, declare the whole sum, principal and accrued interest evidenced by said bonds and coupons then outstanding and unpaid, to be then immediately due and payable and in default. This provision is expressly declared not to be in the nature of a penalty for a breach of condition or for the non-payment of interest, but to be a provision which, having regard to the nature of the mortgaged premises and property, is essentially neces-
103 sary to effectuate the objects and purposes of the parties hereto.

Fourth. In case of any default in the payment of the principal sum evidenced by said bonds, according to the provisions and agreements therein contained, which shall continue for the space of four months after demand or notice, or any default in the payment of interest according to the provisions and agreements of said bonds and coupons which shall continue for the space of four months after demand or notice, and in case of any default, neglect, refusal or failure to observe, do, keep and perform all and singular each and

every covenant, agreement, provision and stipulation in said bonds and coupons and in this mortgage contained, and by said first party to be observed, done, kept and performed, which shall continue for the period of four months after demand or notice, all the rights of the first party to retain the possession of the mortgaged rights, privileges, franchises, easements, choses in action, estate, property, real and personal, effects and assets, shall, upon a request in writing to the second party to take possession of the mortgaged premises and property, signed by holders of thirty per cent. in amount of the bonds outstanding, cease, and thereupon the right of possession of the same shall vest in said second party, and the said second party shall upon request of the holders of thirty per cent. in amount of the bonds secured hereby then outstanding enter into the possession thereof, and the said first party and each and every occupant remove and put out, and may have, receive, sue for, collect and receipt for in its own name, or that of the first party, or any assignee
104 of the first party, all and singular the water rentals and prices due and to become due from the City of Denver, the town of Highlands, the town of Barnum, the town of Montclair, the town of Elyria, the town of Harman, or any other town or city, or from private consumers or others on account of water supplied for fire and domestic or other purposes, and all and singular the income of the first party from whatever source derived, receive and have, and all debts, dues and demands of whatever nature or kind, receive, receipt for, have and appropriate to the purposes of the trusts created by this instrument, and may during such time, as to it may seem fit and best, unless otherwise requested by the holders of a majority in amount of the bonds outstanding, with or without foreclosing this mortgage, continue in the possession of the mortgaged income, rights, privileges, franchises, easements, choses in action, estate, property, real and personal, effects and assets, and operate and carry on the works and business of said first party, and carry out and perform the contracts of the first party with its customers for the supplying of water, including the City of Denver, the town of Highlands, the town of Barnum, the town of Montclair, the town of Elyria, the town of Harman, or any other town or city or other consumer, and make new contracts for the supplying of water, and by means of the works, machinery, mains, pipes and valves of the first party supply water, and do all and singular the acts and things which the said first party could do in the premises, if it had remained in the possession of the same.

Fifth. The said Trustee is hereby authorized and empowered in case it shall deem best, instead of by itself or its agents pro-
105 ceeding to take possession of the property hereby conveyed as aforesaid, as provided in the fourth paragraph hereof, to proceed to enforce the said remedies, and to execute its trust by invoking the aid of any Court, either of the United States or of the State of Colorado, having general equity jurisdiction over the property; it being understood, and is hereby expressly declared, that the right of entry hereinbefore granted, and the enforcement of the same through the aid of a Court of equity having jurisdiction, is intended as a cumulative remedy in addition to the remedies allowed

by law, and the same shall not be deemed in any manner to deprive the Trustee or beneficiaries under this trust of any remedy, legal or equitable, by judicial proceedings consistent with the provisions of this instrument, according to the true intent and meaning thereof; and in the event that the said second party shall, under the provisions of this paragraph, invoke the aid of a Court of equity to enforce the remedy aforesaid, the said second party may, at the commencement of suit, apply for the appointment of a receiver of all the rents, profits, debts, dues, demands, choses in action or property, estate and assets of the first party, hereby conveyed or intended so to be, or which it shall then possess, or be entitled to or interested in, and such receiver may be appointed, and such receiver shall be vested with all the rights and privileges, and subject to all the duties and obligations granted to or obligatory upon the second party, in case of entering into possession, as specified in the fourth subdivision of this instrument.

Sixth. And in case of any default, as aforesaid, in the payment of interest or principal upon said bonds or coupons according
106 to the terms and provisions thereof, which shall continue for four months after demand or notice, or in case of any default, neglect, refusal or failure to observe, do, keep and perform all and singular the covenant, conditions, promises, agreements and stipulations in said bonds and coupons or in this mortgage contained, which shall continue for the period of four months after demand or notice upon the request in writing of the holders of thirty per cent. in amount of the bonds outstanding the said second party shall proceed to foreclose this mortgage and forever bar the first party of all equity of redemption in and to said premises and property, and in case of such foreclosure or any proceedings therefor, the said second party may, at the commencement of suit, apply for the appointment of a receiver of all the rents and profits, debts, dues, demands and choses in action, and the property, estate and assets of the first party hereby mortgaged or conveyed, or intended so to be, or which it shall then possess or be entitled to or interested in, and such receiver may be appointed, and such receiver shall be vested with all the rights and privileges and subject to all the duties and obligations granted to and obligatory upon the second party in case of entry into possession, as specified in the fifth subdivision of this mortgage; and in case of any foreclosure of this mortgage, the whole sum of the indebtedness evidenced by said bonds and past due coupons, both principal and interest, shall be deemed to be due and payable, and such foreclosure shall be to satisfy such whole sum.

Seventh. Notwithstanding anything in this Indenture hereinbefore or hereinafter contained in regard to priority of liens of the
107 coupons of said bonds, it is expressly declared that upon any purchase or sale of, or upon any advance or loan upon any of said coupons made after the date of maturity of such particular coupons, the coupons so purchased or sold or advanced or loaned upon, shall not be deemed to be secured by or otherwise within the trusts of this Indenture unless accompanied by the bond or bonds to which the same originally belonged, except after payment in full of the prin-

cipal and interest on all the bonds to be so issued hereunder and on all the coupons not so purchased, sold, loaned or advanced upon.

Eighth. In no event shall any expense of any kind fall upon said Trustee, but all its reasonable and proper expenses and costs, including the fees and charges of attorneys and agents, employed by it in good faith in the administration of the trusts herein contained, shall be paid by the first party.

Ninth. In case of an entry and taking possession by the second party, or in case of any foreclosure proceedings, or in case of the appointment of a receiver, or in case of the receipt of any moneys, by the second party, or any receiver or officer of Court, from any income, debts, dues or demands, collected or received by it, him or them from any sale of the mortgaged premises, property, franchises, rights, easements, choses in action and assets, or any of them herein mortgaged or conveyed, or intended so to be, or hereafter conveyed by any assignment, conveyance or supplementary mortgage, the reasonable and proper costs and expenses of all kinds of the said Trustee in the administration of the trusts, of foreclosure
108 and sale, of courts, officers and receivers, shall be first paid out of said moneys, and the surplus, if any, shall be devoted to paying the whole of the indebtedness secured hereby, interest and principal, pursuant to the terms of this instrument hereinbefore contained, until the whole thereof is paid, and if there should remain any surplus, the same shall be paid over to the first party.

Tenth. It is stipulated and agreed that the said second party will not certify any of the said one thousand (1,000) of said bonds of one thousand dollars ($1,000) each, numbered consecutively from number 6,501 to number 7,500, both inclusive, and will not deliver the same with its certificate thereon, or suffer the same to become outstanding with its certificate thereon, except for the purpose of sale or delivery subsequent to the date of this mortgage, to raise money with which to pay for the improvement, extension and enlargement of the works of said Company, and the erection or acquisition of additional works and property, and that said one thousand (1,000) bonds in this clause mentioned shall be certified and delivered only by the said second party, its successor or successors in trust, on the written order of said The Denver Union Water Company, its successors and assigns, executed by the President and Secretary thereof, under its corporate seal, in such numbers and to such person or persons as may be mentioned in said order; Provided, that when any application shall be made to said second party, its successor or successors in trust, for the certification and delivery of any of said one thousand (1,000) bonds so to remain in the treasury of said first party as aforesaid, there shall be presented to
109 said second party, with the order aforesaid, and the number of bonds specified therein, executed by said first party by its President and Secretary and under its corporate seal, a written statement of the President of said The Denver Union Water Company, its successors or assigns, under the seal of the corporation, setting forth, first, the resolution of the Board of Directors authorizing the certification and delivery of such bonds, and making the order there-

for; second, the purpose for which said bonds are needed, and if upon such application there shall be endorsed the approval of the committee representing the holders of the bonds then outstanding, viz: George Coppell, Edward E. Poor, James B. Grant, David H. Moffat and Walter S. Cheesman, their successors in office, or a majority of them, the said second party shall, upon such application, certify and deliver so many of said bonds remaining in the treasury of the first party as aforesaid, as shall be mentioned in said application and order, and as shall be presented therewith for such certification and delivery.

But upon full compliance with all the terms and conditions in this paragraph mentioned, the said Trustee shall certify and deliver so many of said one thousand (1,000) bonds as may be mentioned in said order and presented therewith for certification and delivery.

Eleventh. It is stipulated and agreed that the execution by the President and Secretary of the first party, its successors and assigns, under the seal of the first party, its successors and assigns, of any order for the certification and delivery of any of said eight thousand nine hundred (8,900) bonds shall be conclusive evidence
110 of the action of the first party, its successors or assigns, in ordering the issue and delivery of any of said bonds.

Twelfth. The party of the second part, as Trustee or otherwise, shall be under no obligation to recognize any person or persons, firm or corporation, as holder or holders, owner or owners of one or more of the bonds secured hereby, or to do or to refrain from doing any act pursuant to the request or demand of any person or persons, firm or corporation, professing or claiming to be such holder or owner, until such supposed holder or holders shall produce the said bond, and deposit the same with the Trustee, and shall indemnify and save harmless the Trustee to its full satisfaction, from any and all costs and expenses, outlay and counsel fees, and other reasonable disbursements, for which it may become liable or responsible, on proceeding to carry out such request or demand.

Thirteenth. The right of action, under this Indenture is vested exclusively in the Trustee, and under no circumstances shall any bo/dholder, or any number of bondholders have any right to institute an action or other proceeding on or under this Indenture for the purpose of enforcing any remedy herein and hereby provided, except in case of refusal on the part of the Trustee to perform any duties imposed on it by this Indenture, and all actions and proceedings for the purpose of enforcing the provisions of this Indenture shall be instituted and conducted by the Trustee, according to its sound discretion; but the Trustee shall be under no obligation to institute any such suit, or to take any proceedings, under this Indenture, until it shall be indemnified to its full satisfaction, for
111 all the expenses and costs of every kind, and also for all possible claims for damages.

Fourteenth. Should any suit or other proceeding be brought against the Trustee, by reason of any matter or thing connected with the trusts hereby created, or by reason of its being such Trustee, it shall be under no obligation to enter any appearance by counsel or in any way appear in or defend the said suit, or other pro-

ceedings, until indemnified to its satisfaction for so doing; but it may, nevertheless, appear and defend the same without indemnity, if it shall elect so to do, and in such case it shall be compensated therefor, from the trust fund.

Fifteenth. It shall be no part of the duty of the party of the second part to see to the recording of this instrument as a mortgage or conveyance of real estate, or to the filing thereof, as a chattel mortgage, or renewing such mortgage, or to do any other act which it may be suitable and proper to be done for the continuing of the lien of this Indenture, or for giving notice of the existence of such lien, nor shall it be any part of its duty to effect insurance against fire, or other damage on any portion of the mortgaged property, or to renew any policies of insurance, or to pay any taxes, or bid in any of the property, estate and assets hereby conveyed, at any tax sale, or be under the necessity of keeping itself informed as to any of the matters in this clause mentioned; but at its discretion the said Trustee may do and perform any of said acts, and a failure to exercise its discretion shall give no cause of action to any one.

Sixteenth. The Trustee shall only be responsible for rea-
112 sonable diligence in the performance of the trust, and shall not be answerable in any case for the default or neglect of any agent or attorney, or employé, selected with reasonable care and discretion, nor shall it be responsible for the issue and delivery of any of the bonds secured hereby, upon the order of the first party, and in accordance with the terms and conditions in this instrument contained regulating the certification and delivery of bonds.

Seventeenth. The Trustee shall be entitled to be reimbursed for all proper outlays of every sort or nature by it incurred in the discharge of its trusts, and to receive a reasonable and proper compensation for any duties that it may at any time perform in discharge of the same; and all such fees, commission, compensation and disbursements shall constitute a lien on the mortgaged property and premises.

Eighteenth. It is further stipulated and agreed that in case the said Trustee shall desire for any reason to surrender the trust conferred upon it by this instrument, it may at any time do so, by a written certificate to the party of the first part, its successors and assigns, duly acknowledged for record, and thereupon it shall be the duty of the Board of Directors of said first party within sixty days after receiving such notice to appoint some other New York trust company as such Trustee by resolution of said Board and an instrument in writing reciting such resolution executed in the name of the first party, by its President and Secretary, and under its corporate seal, duly acknowledged as required by law, upon which there shall be endorsed the acceptance of such trust by the appointee therein mentioned, also duly acknowledged as required by law; and upon the recording of such certificates of resignation and
113 appointment of a successor and the acceptance thereof, the powers, authority, duties and liability of the second party as such Trustee shall cease and immediately vest in the successor so appointed, and the said second party may after such appointment

of a successor and acceptance, transfer its said trust to such successor by deed duly executed and acknowledged. In the event that such first party shall fail to record such certificates of resignation, appointment and acceptance in the office of the Recorder of Deeds of the County of Arapahoe, Colorado, within sixty days after receiving such certificates of resignation, the said second party may, with or without the consent of the first party, apply to any court, then having equity jurisdiction in the County in which the mortgaged property or any part thereof shall then be situated, either a court of the United States, or of the State of Colorado, for the appointment of such successor, and such court may appoint a successor to the second party, which shall be a trust company of the City of New York; and it is agreed and stipulated that the successor so appointed, whether by act of the parties or by a court, upon accepting the same, shall succeed to all the interests, rights and privileges, and be subject to all the duties and obligations pertaining to the second party hereto, and to all intents and purposes become and be the second party to this instrument, and any subsequent or supplementary assignment, conveyance or mortgage, the same as if originally named therein.

Nineteenth. If at any time there should be in the hands of James B. Grant and David H. Moffat, Trustees for the first party, certain moneys which are applicable to redeem bonds se-
114 cured by this Indenture, then and in such case, it is stipulated and agreed that whenever the said Trustee last above named shall, at least sixty days before the time when any semi-annual installment of interest on said bonds shall become due and payable, deposit with the second party hereto, a sum sufficient to pay off and redeem not less than Ten thousand dollars ($10,000) of the bonds secured hereby at the price of 105 per cent. of the par value thereof, together with the interest thereon to the next ensuing interest date, it shall be the duty of the second party forthwith to advertise for a period of two weeks in one or more daily newspapers published in the City of New York for tenders of bonds to be purchased by said party of the second part at a price not exceeding 105 per cent. of the par value of such bonds, together with accrued interest thereon; and on receiving any tenders for the purchase of such bonds to accept the tenders which are lowest in price for so many of said bonds as can be purchased with the money deposited, provided that the price is less than 105 per cent. of the principal of said bonds, together with accrued interest thereon to the date of purchase. Should the said second party not receive tenders for sufficient of said bonds at a price less than 105 per cent. of the par value of the principal thereof and accrued interest thereon, it shall then be the duty of the second party to reject any and all such tenders, and proceed to forthwith draw by lot such a number of said bonds as the said Trustees above named have deposited the money to redeem at the price of 105 per cent. of the principal thereof, together with interest to the next ensuing interest date; and thereupon the said second party hereto shall proceed to give
115 public notice in two or more daily newspapers published in the City of New York for at least twenty days before the

next ensuing installment of interest on said bonds becomes due, that the bonds so drawn by lot, naming them by number, shall be paid off and redeemed at the office of said second party on the presentation and surrender of the same at the price of 105 per cent. of the par value thereof, together with the interest thereon then due and unpaid, and thereupon all interest upon said bonds so drawn and advertised shall cease from and after the date fixed in such notice for the payment thereof. The said second party shall, upon the redemption of any such bonds, deface and cancel the same, so as to render them incapable of negotiation, and return the same to the party of the first part; all expenses of such drawing and advertising, including the compensation of the Trustee, shall be paid by the party of the first part.

Twentieth. In case the City of Denver shall have a right to purchase the works and property of the first party, situated within its corporate limits, on the tenth day of April, 1910, and in case of such purchase, if the first party shall be obliged to deliver the property of the first party so purchased to the said City of Denver, free and clear of all incumbrances; and it shall be necessary to pay off and redeem the whole of the indebtedness secured by this instrument, it is agreed that all the moneys to be received by the said first party from the said City of Denver on account of said purchase shall be payable to the said second party directly from the City, and the same are hereby assigned to the said second party, for the purposes of the trust by this instrument created.

116 In case of any such sale of the property of the said Company to the said City of Denver, the said first party shall notify the said second party thereof, and require it to make a call of all the bonds outstanding secured by this instrument, at any time during the year beginning April 10th, 1910, and ending with April 9th, 1911; and thereupon it shall be the duty of said second party to forthwith publish in two or more newspapers published in the City of New York, New York, a notice that all the bonds secured by this instrument, will be paid off and discharged at the price of the par value thereof, together with accrued interest thereon to the date of payment, on the presentation and surrender of the same at the office of the second party, which said notice shall be published at least thirty days prior to the date fixed therein for the payment of said bonds; and after said date fixed for the payment of said bonds all interest on the same shall cease; and after the date fixed in said notice for the payment of said bonds, the said second party shall out of any funds in its possession pay off and discharge the said bonds, as the same shall be presented for payment and surrender, at the price of the par value thereof, together with the accrued interest thereon to the date fixed for the payment thereof; Provided, however that said second party shall not be under any obligation to publish such notice, unless it shall have evidence which it deems sufficient that the money for the payment of said bonds at the price aforesaid is forthcoming, and is or will be in hand for the payment of said bonds and its costs and charges in the premises; nor shall it be under any obligation to pay off any

of said bonds, unless there shall be on the day fixed for the
117 payment by said notice, sufficient funds on hand to pay off and discharge all the bonds outstanding and secured by this instrument at the price of the par value thereof, and accrued interest to the date of payment thereof, together with the costs and charges of the second party in the premises. All surplus moneys over and above an amount sufficient to pay off and discharge all of said bonds which may be outstanding at the price of the par value thereof, with accrued interest to the date fixed for payment and the costs and charges of the Trustee in the premises, shall be forthwith paid to the party of the first part, its successors and assigns, as the property of the said first party.

Upon the payment to said Trustee, at any time during said year ending April 9, 1911, of sufficient moneys to pay off and discharge all of said bonds then outstanding at the price of the par value thereof, with the accrued interest thereon, to the date fixed for the payment of said bonds, and the costs and charges of the said Trustee in the premises, it shall be the duty of said Trustee forthwith to release and discharge this instrument, and to cancel and mark as paid, all of said bonds as the same are surrendered, and to deliver such cancelled bonds to the first party, taking its receipt therefor.

Twenty-first. The Committee of five, whose assent is made necessary by the previous provisions of this instrument, to the issuing and delivery of any of the one thousand bonds numbered from number six thousand five hundred and one (6,501) to number seven thousand five hundred (7,500) both inclusive, is at present composed of George Coppell, Edward E. Poor, James B.
118 Grant, David H. Moffat and Walter S. Cheesman. In case of any vacancy arising by resignation, disability or death of either of the two foregoing named gentlemen, George Coppell and Edward E. Poor, the survivor of the two, may fill the vacancy, and in case of any such vacancy arising from the resignation, disability or death of either of the two foregoing named gentlemen, David H. Moffat and Walter S. Cheesman, the survivor of the two may fill the vacancy, and in case of a vacancy arising from the resignation, death or disability of said James B. Grant, then his successor, who shall be a resident of the City of Denver, Colorado, shall be selected by the agreement of said remaining four of said Committee of five, or a majority thereof, and in the event they do not agree and make such appointment within ninety days from the occurring of said vacancy, then such successor shall be appointed by some Court of competent jurisdiction in said State of Colorado, either a Court of the United States or of the State of Colorado, upon application made by said party of the first part, the survivors of said Committee or any two members thereof, said successor to be a resident of the City of Denver, Colorado. Upon any such application for the appointment of a member of said committee by a Court, the only parties necessary as plaintiffs and defendants shall be The Denver Union Water Company and the surviving members of said committee.

In case of the filling of any such vacancy by the survivor or survivors, the said survivor or survivors shall by an instrument

under his or their hands and seals, and acknowledged before
119 an officer authorized to take the acknowledgement of deeds, certify the fact of such appointment to the said Trustee, and upon such presentation of such certificate the said Trustee shall be bound to recognize the person so appointed as one of the said committee, and such certificate so executed and acknowledged may be recorded as a supplement to this instrument. And in the event that such appointment is made by a Court as hereinbefore provided, a certified copy of the order making said appointment shall be delivered to the trustee herein and may be recorded with the same force and effect as the certificate hereinbefore provided for. The said committee as at any time constituted shall have all the powers of the full committee, and wherever in this instrument there is required the consent of said committee, it is understood that it is the consent of three members thereof, upon an application having been submitted to each member of the committee as at the time constituted, it being the intention to provide that while all action shall be the action of the committee, by means of the action of a majority thereof, at the same time not to require a meeting or coming together of the members of the committee. It is hereby specially provided, however, that an affidavit made by the President or Secretary of the said The Denver Union Water Company, to the effect that a copy of such request was mailed to each member of the said committee who shall not have endorsed said request, directed to the last known postoffice address of such member, ten days prior to the presentation to the party of the second part herein of such application, as hereinabove provided, shall be con-
120 clusive evidence for all purposes that such members have been properly served with the notice hereby required.

Twenty-second. And it is further stipulated and agreed that during the continuance of this mortgage, the said first party will not commit or suffer to be committed, any waste of its property or assets, and that it will at all times during the continuance of this mortgage, promptly and before any penalty or forfeiture shall attach, in due season, pay or cause to be paid, the taxes, levies and assessments laid upon it or its property or assets by any lawful authority. And in case of a failure to do so, the said Trustee, in its discretion, may pay the same and add the same to the sum secured by this mortgage, and the same, with seven per cent. interest, shall be preferred to the debts evidenced by said bonds and coupons, and any breach of this agreement for the payment of taxes, for the space of four months after any penalty shall have attached, and after demand or notice to pay the same, shall entitle the Trustee, upon the written request of the holders of thirty per cent. of the amount of the bonds outstanding, to declare the whole sum due, and to enter and take possession, and, upon the request in writing of the holders of thirty per cent. in amount of the bonds secured hereby, to foreclose this mortgage, or both. And it is further stipulated and agreed that, during the continuance of this mortgage, the said first party will not do or suffer to be done any act or acts whereby the security of the said bondholders shall be in any way or manner, or in any amount, impaired.

Twenty-third. It is understood and agreed that all the conveyances, covenants, agreements and stipulations herein men-
121 tioned and contained, apply to and bind as well the successors and assigns of the respective parties, as the parties themselves.

Twenty-fourth. It is hereby declared that the receipt or receipts of the Trustee shall be sufficient discharge to the purchaser or purchasers at any sale or sales made by the said Trustee, under or in pursuance of any or either of the provisions for that purpose herein contained, for his or their purchase money; and that such purchaser or purchasers, his or their heirs, executors or administrators, shall not, after payment thereof, and having such receipt, be liable to see to its being applied for, or upon the purposes and trusts of these presents, or in any manner howsoever be answerable for any loss, misapplication or non-application of such purchase moneys, or any part thereof.

Twenty-fifth. On any sale of the property hereby conveyed, or any part thereof, the Trustee shall have the right to purchase the same, and a majority in amount of the holders of the outstanding bonds shall have the right by a written instrument, under the hands and seals of such majority, to fix a sum, which it shall be the duty of the Trustee to bid for the property to be sold, on behalf and for the benefit of such bondholders, but only on condition that due provision is made by such majority to the satisfaction of the said Trustee, or the Court, as the case may be, for the payment in cash of all expenses incurred in the execution of the trusts of these presents, and of the proportion of such sum payable to the bondholders not concurring in such request. On any purchase the Trustee shall hold the property so purchased upon trust, for the equal
122 benefit of the bondholders, who had required the Trustees to buy in the property in their behalf, as the absolute property of said bondholders, without any right of redemption or re-sale in favor of said Company, or any bondholder.

Twenty-sixth. In case of any sale of the mortgaged property as hereinbefore described, by order and decree of any Court, it is agreed that such sale is absolute, and without any right of redemption in favor of said Company, its successors or assigns, and the said first party hereby waives the benefit of all stay, valuation, appraisement and exemption laws, and all right of redemption by virtue of any law of the State of Colorado both such as now exist or which may be hereafter enacted. And the said first party will forthwith, upon any such sale, upon request of the purchaser thereat, make, execute and deliver to such purchaser, his representatives or assigns, a good and sufficient deed or deeds to confirm the title in such purchaser, and to release all such rights under any such laws. And on any foreclosure sale, having in view the nature of the property, its relation to the City of Denver and other municipalities, the public character of its business, the fact that its tangible property, real, personal and mixed, is held by the first party for use in performing its duties and obligations, and under certain franchises now held, used and enjoyed by the first party, and the impossibility of a sale thereof in parcels, it is declared that

all the mortgaged property, franchises, premises, rights, easements, mains, pipes, valves, works, apparatus and assets shall be sold as an entirety.

Twenty-seventh. It is understood and agreed that neither
123 the said Trustee nor the holders of said bonds shall, at any time, have any claim for any part of the indebtedness evidenced by said bonds and coupons against any stockholder in said The Denver Union Water Company, by reason of, or on account of, any alleged liability of any stockholder to said first party on account of the capital stock held by him or them.

Twenty-eighth. The Trustee shall have power to release from the lien of this mortgage any land, machinery or other property, which has become useless for the purposes of the Company, from any cause, but only on condition that the proceeds of such property be used in the purchase of other property of equal value, and subject to the lien of these presents. Whenever the said first party, its successors or assigns, shall make application for release from the lien of this mortgage of any such land, machinery or other property, executed by the President and Secretary of the Company, under its corporate seal and verified by an affidavit of the President and Secretary, as to the facts necessary to obtain such release under this clause, such application and affidavit shall be sufficient evidence to warrant any action upon the part of the Trustee, in making such release, under this clause.

Twenty-ninth. It is understood and mutually agreed by and between the parties hereto that the word "Trustee" when and as used in these presents, except where some other is plainly referred to, is intended to refer to and describe, and shall be considered to mean, the corporation or corporations, or the person or persons which or who, for the time being, shall be charged with the execution of the trusts of these presents, whether the same be said party of
124 the second part or any successor or successors in said trust.

Thirtieth. And Whereas, by reason of distance and lapse of time, or other accident, the dates of the actual execution of this indenture of mortgage and trusts, by the various parties thereto, may be previous or subsequent to the day on which it bears date, now, it is hereby expressly agreed and declared that this indenture of mortgage and trust shall be dated the 20th day of October, A. D. 1894, and shall be valid and effectual as if executed on the day of the date thereof, and this indenture of mortgage and trust is the indenture of mortgage referred to in the bonds hereinbefore mentioned, the form whereof is hereinbefore set forth and is made and executed by and between the parties hereto, as and for the indenture of mortgage and trust securing and intended to secure said bonds, as in said bonds is mentioned and recited.

Thirty-first. In further consideration of the premises, the said first party, for itself, its successors and assigns, doth covenant, grant, bargain and agree to and with the said second party, its successors and assigns, that it is well seized of all the mortgaged property and assets; and that all said rights, privileges, easements, estate and property, real and personal, effects and assets hereby conveyed and

mortgaged or intended so to be against all lawful claims, it will forever warrant and defend.

And in further consideration of the premises, the said first party, for the further assurance of the second party and the holders of said bonds, doth covenant, grant, bargain and agree to and
125 with the second party that it will at any time in the future, upon demand, at its own expense, execute, deliver and record (if proper for record) all such further and other conveyances, assignments and supplementary mortgages of the rights, privileges, easements, estate, choses in action, property, real and personal, effects and assets, hereinbefore described, or which are now owned by it, whether covered by this mortgage or not, except such as are by the terms of this instrument expressly excluded from the operation hereof, wheresoever situated, and of any right, privilege, easement, estate, choses in action, property, real and personal, effects, and assets which it may at any time hereafter acquire, wheresoever situated, as the second party may demand to subject the same to the lien of this mortgage, and such further and other conveyances, assignments and supplementary mortgages shall be deemed a part of this instrument and form together one security for the payment of the debt evidenced by said bonds and coupons.

And in further consideration of the premises, the said first party doth covenant, grant, bargain and agree to and with the said party of the second part that during the continuance of this mortgage it will not suffer or permit any lien of mechanics or material men, or others of any kind, or any incumbrance of any kind upon any property or assets to be acquired, which shall be a prior lien to the lien of this mortgage, or before the execution of an instrument subjecting the same to the lien of this mortgage.

The recitals herein contained are made on behalf of the
126 party of the first part, and the party of the second part assumes no responsibility as to the correctness of any statement herein contained.

And inasmuch as it is intended that this indenture shall be simultaneously recorded in the proper offices in each of the several counties of the State of Colorado wherein the property and premises conveyed hereby or intended so to be, or in which some part thereof is situate, or in which it is intended to acquire property, premises, rights and franchises, viz: the counties of Arapahoe, Jefferson, Douglas, Park and Weld, in the State of Colorado, or as near at the same time as possible, this indenture witnesseth that although five copies or counterparts thereof are simultaneously executed by the Company, by its President and attested by its Secretary, under its corporate seal, in pursuance of a resolution of its Board of Directors and delivered to said Trustee; and the said Trustee in evidence of its acceptance of the trusts hereby created, has likewise executed each of said five copies or counterparts simultaneously, to the end that one thereof may be recorded in each of said counties, as aforesaid; all such copies or counterparts are so executed and delivered each as an original, and shall constitute but one instrument.

In Witness Whereof, the said The Denver Union Water Company hath caused these presents to be executed by its President and at

tested by its Secretary, and sealed with its corporate seal, at
127 the City of Denver, in the County of Arapahoe, and State of Colorado, this 20th day of October, A. D. 1894.

(Signed) THE DENVER UNION WATER COMPANY,
By WALTER S. CHEESMAN, *President.*

[Corporate Seal D. U. W. Co.]

Attest:
(Signed) WALTER P. MILLER, *Secretary.*

STATE OF COLORADO,
County of Arapahoe, ss:

On this twentieth day of October, A. D. 1894, personally appeared before me, a Notary Public in and for said County, Walter S. Cheesman, President, and Walter P. Miller, Secretary of The Denver Union Water Company, personally known to me to be such officers of said Company, and to be the same persons who as such President and Secretary of said The Denver Union Water Company, executed the foregoing instrument, by its name and in its behalf as such President and Secretary respectively, and each acknowledged in behalf of said corporation, that the foregoing instrument was the free and voluntary act and deed of the said The Denver Union Water Company, executed by it for the uses and purposes therein mentioned, and the said Walter S. Cheesman and Walter P. Miller, being by me first duly sworn, did each depose and say that the said execution and attestation of said instrument by them respectively as the President and Secretary of said The Denver Union Water Company and the affixing of the seal of the
128 said The Denver Union Water Company to the foregoing instrument was by order of the Board of Directors of said Company, and that said instrument was executed, attested, sealed, delivered and acknowledged by such order of said Board of Directors.

In Witness Whereof, I have hereunto set my hand and affixed my Notarial Seal the day and year above written.

My Commission Expires May 11th, 1897.

[NOTARIAL SEAL.]
(Signed) ALBERT SMITH,
Notary Public.

The trustee named in the foregoing instrument, as the party of the second part thereto, hereby accepts the trusts thereby created, upon the conditions expressed in the foregoing Indenture of Trust.

In Witness Whereof, the said Continental Trust Company of the City of New York hath caused the foregoing acceptance of trust to be executed by its President and attested by its corporate seal.

(Signed) CONTINENTAL TRUST CO. OF THE CITY OF NEW YORK,
By OTTO T. BANNARD, *President.*

[Corporate Seal C. T. Co. of the City of N. Y.]

Attest:
(Signed) HENRY E. DABOLL,
Ass't Secretary.

STATE, CITY AND COUNTY OF NEW YORK, *ss:*

On this 26th day of October A. D. 1894, personally ap-
129 peared before me, Clinton E. Braine, a Notary Public in and for said County of New York, Otto T. Bannard, President, of said Continental Trust Company of the City of New York, and known to me to be such officer, and to be the same person who as said President of said Continental Trust Company of the City of New York, executed the foregoing instrument in its name and on its behalf by him as such President, and acknowledged in behalf of said Continental Trust Company of the City of New York, that the foregoing instrument was the free and voluntary act and deed of the said Continental Trust Company of the City of New York executed by it, for the purposes therein mentioned; and the said Otto T. Bannard being by me first duly sworn, deposes and says that he is the President of said Continental Trust Company of the City of New York, and that the foregoing acceptance of trust was executed and delivered by order of the Board of Directors of said Continental Trust Company of the City of New York.

In Witness Whereof, I have hereunto set my hand and affixed my Notarial Seal the day and year above written.

My Commission as a Notary Public will expire March 30th, 1896.

[NOTARIAL SEAL.]

(Signed) CLINTON E. BRAINE,
Notary Public, Kings County.

Certificate filed in N. Y. County.

STATE OF NEW YORK,
City and County of New York, ss:

I, Henry D. Purroy, Clerk of the City and County of New York, and also Clerk of the Supreme Court for the said City and
130 County, the same being a Court of Record, Do Hereby Certify, That Clinton E. Braine has filed in the Clerk's office of the County of New York, a certified copy of his appointment as Notary Public for the County of Kings, with his autograph signature, and was at the time of taking the proof or acknowledgment of the annexed instrument, duly authorized to take the same. And further, that I am well acquainted with the handwriting of said Notary, and verily believe the signature to the said certificate of proof or acknowledgment to be genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court and County, the 27th day of October, 1894.

[OFFICIAL SEAL.]

(Signed) HENRY D. PURROY, *Clerk.*

131 "EXHIBIT C."

Ordinance No. 163. Series 1907.

Aldermanic Bill No. 110.

Introduced by Ald. Bush.

A bill for an ordinance authorizing and empowering the City and County of Denver to enter into a contract with The Denver Union Water Company, whereby said company shall agree that the City and County of Denver may purchase the property of said company under an appraisement to be made in accordance with Section 11, of ordinance No. 44, of the Series of 1890, before the arrival of the time fixed therefor in said contract, and authorizing the appointment of appraisers by a committee composed of the mayor, the president of the board of supervisors and the president of the board of aldermen in accordance with the provision for an appraisement of said property in the manner provided for in said Section 11 of Ordinance No. 44 of the Series of 1890, and to determine the fair and reasonable value of the water plant of said The Denver Union Water Company, and the corporations and persons used by said The Denver Union Water Company in supplying water to the City and County of Denver and to inhabitants of the said City and County of Denver, and prescribing the manner of executing and carrying out such contract.

Whereas, on April 10th, 1890, a contract was made and entered into between the City of Denver and The Denver Water Company, contained and set forth in Ordinance No. 44 of the Series of 1890, which was duly enacted, granting The Denver Water Company the right of laying down, continuing and maintaining water
132 pipes, valves, hydrants and apparatus for the conveyance and distribution of water through the streets, alleys and public places of said city, for the use of said city, and the inhabitants thereof; and

Whereas, in and by said contract so contained in said ordinance, it is provided in Section 11 thereof, that:

"At the expiration of the period of twenty years from and after the date of the passage and approval of the ordinance, in case the city shall then elect so to do, the said works may be purchased by the said city, and in case the parties cannot agree, after such election, upon the price to be paid by the city for the water works of the said company, its successors and assigns, then their fair cash value shall be determined by arbitration, by five disinterested persons, none of whom shall be residents of Denver, two of them to be chosen by the City, two by the company, and the fifth by the four first chosen, and in case of failure on the part of the company to name arbitrators for the period of thirty days after the city shall have named arbitrators and notified the company so to do, the city may apply to any court having equity jurisdiction in the county in which the City

of Denver shall then be situated for the appointment of two persons of the qualifications aforesaid as such arbitrators, and the court may thereupon appoint two such persons, who shall act with the same force and effect as if appointed by the company, and the
133 decision of a majority of said board shall be final and binding upon both parties, and upon the payment, or tender of payment, by said city the said company shall convey to said city all of its property, real or personal, easements, rights and privileges and thereafter all franchises, rights and privileges which have been at any time theretofore granted said company, its successors or assigns, and which it may then possess, shall cease and be at an end."

And Whereas, The Denver Union Water Company has become the owner of the properties and franchises of the said The Denver Water Company, and is at the present time its successor in and the holder of the said contract set forth and contained in said Ordinance No. 44 of the Series of 1890, aforesaid; and,

Whereas, Section 5 of the Ordinance No. 44 of the Series of 1890, provides that:

"The rate to private consumers for water shall not be greater than now charged by the said The Denver Water Company, a schedule of which rates is hereto annexed marked Schedule A, and the said The Denver Water Company may require any consumer to furnish a meter and pay for water by meter measurement; Provided, however, That, at any time after five years from date, the city council may require said company to fix schedule rates for private consumers
134 equivalent to the average rates prevailing in the cities of Chicago, St. Louis and Cincinnati for the same service."

And, Whereas, it has been deemed desirable that efforts should be made by and on behalf of the City and County of Denver to purchase the water plant and property owned and used by The Denver Union Water Company in supplying water to the City and County of Denver and the inhabitants thereof, in accordance with the terms and provisions of the said contract of April 10, 1890, and upon a valuation thereof fixed by disinterested appraisers selected in accordance with the terms of said contract; and,

Whereas, the Mayor of the City and County of Denver, at the request of the members of the Council of the City and County of Denver, entered upon negotiations with The Denver Union Water Company for the purpose of ascertaining whether or not said appraisement might be made and said purchase effected before the time fixed in and by the terms of said contract—the said The Denver Union Water Company waiving the right to insist that said purchase could not be made under the terms of said contract until after the expiration of the period fixed therefor in the paragraph thereof, hereinbefore quoted; and,

Whereas, a correspondence was conducted between the said Mayor of the City and County of Denver and the said The Denver Union Water Company, copies of which have been heretofore transmitted to the Council of the City and County of Denver, and considered by said Council; and,

Whereas, said The Denver Union Water Company has an
135 abundant supply of water at all seasons of the year for the present and future needs of the City and County of Denver and its inhabitants, but admits that from time to time additions must be made to the conduits and pipes used in conducting and distributing said supply, and that in view of the shortness of the time which will elapse before the appraisers are to be appointed under and in accordance with the terms of the contract of April 10, 1890, the said The Denver Union Water Company is unwilling to expend large sums of money in building pipes and conduit lines for use in the future and after the arrival of the time when the said City and County will have the right to purchase said plant under appraisement, in view of the existing uncertainty as to whether the City will exercise its right and option to purchase said plant at said time; and,

Whereas, as a result of said investigation, negotiations and inquiries made and conducted by the City and County of Denver, it has become apparent to said City that a delay in the appointment of said appraisers for more than two and one-half years, as provided by the terms of said contract, would be to the detriment of the City and County of Denver and its inhabitants, would produce an unsettled condition of affairs with reference to said purchase, causing financial loss to said corporation, and that it is desirable and will be of advantage to the City and County of Denver and the inhabitants thereof that there should be, as speedily as it may be had, an appraisement under said contract and a determination of whether the City will purchase the property owned and used by said The Denver Union Water Company in supplying water to the City and County of Denver and the inhabitants thereof; and,

136 Whereas, the City and County of Denver has obtained from said The Denver Union Water Company its consent to waive the period of time fixed and set forth in Section 11 of said contract and ordinance, and to agree to proceed in conjunction with the City and County of Denver in accordance with the terms of said contract to the appointment of said appraisers at the present time, and to permit the City and County of Denver to purchase said property upon an appraisement and in accordance with the terms and conditions of said contract and ordinance without awaiting the expiration of the period fixed therefor in and by the terms of said contract and ordinance; and,

Whereas, in connection therewith, the City and County of Denver has exacted and required of and from the said The Denver Union Water Company an agreement that the said The Denver Union Water Company will submit to the City Council of the City and County of Denver, and through it to the electors of the City and County of Denver, qualified to vote thereon, a proposition for a new contract, plainly specifying, setting forth and containing what rates for water furnished to private consumers shall be charged during said period and the rates and terms upon which it will supply to the City and County of Denver for its uses and for fire hydrant rentals for said period of twenty years, within ninety days

from and after the passage of this ordinance, said rates to be ascertained and fixed for said submission by the arbitrators selected to appraise the property of said company as hereinafter set forth; so that both of said propositions, to-wit:

1st. Shall the City and County of Denver purchase the property so owned and used by The Denver Union Water Company
137 and such allied and auxiliary corporations, persons or associates as may hold the legal title thereto, now engaged in furnishing the City and County of Denver and its inhabitants with water, at a price to be ascertained and fixed by said appraisers to be appointed in the manner provided for and with the qualifications set forth in said Section 11 of said ordinance?

2nd. Shall the people of Denver make a contract for a period of twenty years with rates for water to be furnished to the City and County of Denver, and to the private consumers of water therein, plainly, specifically and unmistakably set forth and ascertained by appraisers as hereinafter set forth? shall be submitted at the same election to the electors qualified to vote thereon (?)

So that the said electors of the City and County of Denver, so qualified to vote thereon, shall have the choice and opportunity of determining which of said propositions they may desire to accept; and the said City and County of Denver having also obtained from said The Denver Union Water Company the assurance and agreement that it will agree with the said the City and County of Denver to put in force an arrangement and agreement fixing temporary rates to be paid said The Denver Union Water Company by the private consumers of the City and County of Denver, to be charged and collected from and after the first day of November, A. D. 1907, and for the remainder of the term of the present contract, in the event that the City and County of Denver shall not, at said election hereinabove referred to, determine to purchase said plant or to extend or renew said contract for a further period of twenty years; and,

138 Whereas, it is the judgment of the Council of the City and County of Denver, under the circumstances above narrated, that it is advantageous to said City to proceed forthwith to an acceptance of said agreement of the said The Denver Union Water Company and to the appointment of appraisers as provided in Section 11 of said contract of April 10, 1890, and to accept the proposition of said The Denver Union Water Company to waive the time limit therein specified, and that in this determination and conclusion the City Council of the City and County of Denver is fortified by the fact that the contract between The Denver Union Water Company and certain municipalities now incorporated in and made a part of the City and County of Denver require adjustment, the former town of Highlands and the former town of Globeville, now both embraced within the limits of the City and County of Denver;

Now, Therefore, Be it Enacted by the Council of the City and County of Denver:

Section 1. In consideration of the premises and the mutual covenants and agreements hereinafter set forth and in further considera-

tion of Five ($5.00) Dollars in hand paid by The Denver Union Water Company to the City and County of Denver, the receipt whereof is hereby acknowledged and confessed, the City and County of Denver, party of the first part, and the said The Denver Union Water Company, a corporation organized and existing under the laws of the State of Colorado, party of the second part, hereby mutually covenant and agree to and with each other as follows, to-wit:

1. It is hereby agreed that five (5) disinterested persons,
139 none of whom shall be residents of the City and County of Denver, shall be appointed to appraise the value of the plant and property of the said Company, two of them to be chosen by the City and County of Denver through a committee herein named and authorized to make such selection, two by The Denver Union Water Company, and the fifth by the four first chosen as herein provided, the said appraisers to be selected by the City and County of Denver, to be named by said committee composed of the Mayor of the said City and County of Denver, the President of the Board of Supervisors and the President of the Board of Aldermen of the City and County of Denver; and said Mayor, President of the Board of Supervisors and President of the Board of Aldermen are hereby authorized to make said appointments, and in the event that all three may not agree, then two thereof are hereby authorized and empowered to select such appraisers and to take such steps and legal action as may be necessary for that purpose; said selection or said appointment of said appraisers by The Denver Union Water Company and the City and County of Denver in the manner herein provided, to be made within thirty (30) days after the execution of this contract, and that the fifth of said appraisers shall be selected by the first four members selected as herein provided, within thirty (30) days after the appointment of said four appraisers.

2. It is further hereby agreed and provided that such appraisers and arbitrators, so selected as herein provided, after their selection and appointment and before proceeding to hear or determine the matters submitted to them, shall take and subscribe an oath before some person duly authorized by law to administer oaths, to
140 the effect severally that they will well, truly and impartially discharge their duty as such appraisers and arbitrators and all the matters and things submitted to them under this agreement to the best of their ability.

3. It is further hereby agreed and provided that the decision of any three of said appraisers shall be binding as to the questions submitted to them for determination under this agreement.

4. It is further hereby agreed that said appraisers and arbitrators shall view the premises and examine the property affected by and to be appraised under this agreement and shall hear such evidence and make such inquiries with reference thereto as may enable them properly to understand their duty, and after having so done and having heard such matters as shall be brought to their attention by the parties hereto, respectively, and such other evidence as they may determine to consider affecting the value of the premises and

property belonging to or used by The Denver Union Water Company, or any of its allied and auxiliary corporations or associations or persons connected with it, engaged in or assisting in the business of supplying the City and County of Denver and its inhabitants with water, and after hearing arguments by the respective representatives of the parties hereto, relating thereto and after due consideration of the same, shall determine and fix the fair cash value of the property, business and rights so owned or used by The Denver Union Water Company, party of the second part, its allied and auxiliary corporations and associations and persons connected with it aforesaid, by which said company at the present time supplies water to the said City and County of Denver, party of the
141 first part, and its inhabitants, or to anyone else at any place whatever, for domestic, manufacturing, or irrigating purposes and which shall constitute and include all the property, rights and privileges of every kind and nature whatsoever acquired by said party of the second part from its predecessor, The Denver Water Company, or from any person or corporation whatsoever, whether the legal title be held by said The Denver Union Water Company or by some other person; and also all property, real or personal, easements, rights and privileges and contracts of every and all nature and kind whatsoever acquired by said party of the second part, its allied and auxiliary corporations or associations or persons connected with it, since their respective incorporations, which are in any way connected with or relate to said water plant of said The Denver Union Water Company, or held by its allied or auxiliary corporations or associations or persons connected with it, or necessary or useful for its protection, maintenance and operation; and also separately ascertain the fair cash value of all that portion of said pipes, pumps, hydrants, mains and valves now used by The Denver Union Water Company, party of the second part, its allied and auxiliary corporations or associations and persons connected with it, owned by the City and County of Denver, party of the first part.

5. It is further hereby agreed that upon the appointment of said appraisers and arbitrators as so provided, they shall with all convenient speed and dispatch proceed to the hearing and determination of the matters set forth in Section 4 hereof, and shall thereupon make a full and complete report of their determination in writing, signed by said appraisers, or in the event their de-
142 terminations are not unanimous, by a majority thereof, one copy to be submitted to the Mayor and Council of the City and County of Denver, party of the first part, and one copy to The Denver Union Water Company, party of the second part; and thereafter and as soon as may be by proper procedure in accordance with law, there shall be submitted to the electors of the City and County of Denver to vote thereon, the question of whether the City and County of Denver shall purchase of The Denver Union Water Company, its allied and auxiliary corporations and associations and persons connected with it, their successors or assigns, the property referred to and described in Section 4 hereof, at and for the price

xed by said Board of Appraisers and Arbitrators proceeding as
'oresaid; and also at the same time, to the electors qualified to vote
iereon, the question as to whether a contract or franchise shall be
ranted to The Denver Union Water Company, party of the second
art, its successors and assigns, to supply water to the City and
ounty of Denver and its inhabitants upon the schedule, terms and
onditions and for the rates set forth in a proposition to be made
y the said The Denver Union Water Company, party of the second
art, as provided herein, with rates in said contract to be definitely
xed and easily and plainly understood, and to be ascertained and
xed by said Arbitrators herein provided for, and which shall be
air, just and reasonable rates for the water supplied and services
erformed and give to said Company fair, just and reasonable re-
urns upon a fair and reasonable valuation of its property, and to
over a period of twenty (20) years from and after the date of said
election; and it is further distinctly understood and agreed
43 that The Denver Union Water Company, in said proposal for
a new contract for said period of twenty (20) years, agrees
o provide for the purchase for cash from the City and County of
Denver of all the mains, pipes, pumps, hydrants and valves now
ised by the said The Denver Union Water Company, its allied or
auxiliary corporations or associations, in furnishing the City and
County of Denver or its inhabitants with water, and which is now
owned by said City and County of Denver, at and for the price to
e fixed thereon by the appraisers and arbitrators herein provided
for and who are to appraise and determine the value of said property
for said purpose.

6. It is hereby further agreed that if at such election so to be
eld as herein provided, the electors qualified to vote thereon shall
refuse to accept the proposition of the said party of the first part for
a new contract with rates therein specified as herein provided, and
the qualified electors to vote thereon shall accept the said proposition
with reference to the purchase of said plant and property at the
valuation fixed by said appraisers and arbitrators as herein pro-
vided, then the said The Denver Union Water Company, party of
the second part, hereby covenants and agrees that it will, upon the
payment of the price so fixed by said appraisers, either in money or
in the bonds of the City and County of Denver lawfully issued
therefor bearing interest at the rate of four (4 per cent) per cent.
per annum, convey, transfer and deliver to said City and County
of Denver all of its said water plant and property, real and personal,
with all the easements, rights and privileges, and all the property,
real or personal, easements, rights and privileges of what-
144 ever kind or nature, belonging to its allied and auxiliary
corporations and associations or persons connected with it,
used in connection with the business of supplying water to the City
and County of Denver and its inhabitants, and being the said prop-
erty referred to in Section 4 hereof; and that from and after said
transfer and the payment and delivery thereof to The Denver Union
Water Company of said price therefor in cash or in said bonds of
the City and County of Denver, as herein provided, all franchises,
rights and privileges which have at any time theretofore been

granted to the said The Denver Union Water Company or its successors and assigns by the City and County of Denver, or any of its component municipalities, or which have been transferred to said The Denver Union Water Company, or to any of its successors and assigns, and its allied and auxiliary corporations or associations, and which it shall then possess, shall then be at an end without further action or determination of the same.

7. It is further hereby agreed that if at said election so to be held as herein provided, the electors qualified to vote upon said proposition shall refuse by their majority vote to accept the proposition of said The Denver Union Water Company and its allied and auxiliary corporations or associations, to purchase said water plant, but shall vote to grant a new contract to The Denver Union Water Company, specifying the rates therein to be charged in the manner herein provided, then said party of the second part, its successors and assigns, shall receive from the City and County of Denver a franchise or contract containing the terms provided for therein for a period of twenty (20) years from the date of said election.

145 8. It is further hereby agreed that if at said election as herein provided, and which it is understood and agreed and is provided hereby shall be a special election called for considering said two propositions, the electors qualified to vote thereon shall, by their majority vote, refuse to accept either the proposition as to the purchase of said property or as to the granting of a new contract, the action of the said parties hereto in entering into this agreement and in submitting said matters to the vote of the electors qualified to vote thereon as herein provided, shall not constitute a waiver of the rights or privileges of either party hereto or prejudice in any manner or form or to any extent whatever the rights and privileges of the City and County of Denver, party of the first part, or The Denver Union Water Company, party of the second part, under and by virtue of the provisions, or any of them, of the said contract of April 10, 1890, being said Ordinance No. 44 of the Series of 1890, all the rights, privileges and franchises of either party hereunto provided for or contained in and by the terms of said contract and ordinance shall be and remain in full force and effect the same as if this contract and agreement had not been entered into and none of the proceedings herein provided for had been taken.

9. It is further hereby agreed that in case either of the parties named as appraisers and arbitrators by the party of the first part shall die, fail or refuse to become unable to act as such appraiser and arbitrator before the final determination of the matters herein involved, then the Mayor of the City and County of Denver is hereby authorized to forthwith thereafter name and appoint some other person, having the qualifications hereinbefore set forth,

146 to be an appraiser and arbitrator in the stead and place of the one before appointed and unable and failing to act as herein provided; and so, in like manner, in case *of* either of the persons appointed as appraisers and arbitrators by the party of the second part shall die or refuse or become unable to act as such appraiser and arbitrator before the matters herein referred to are

settled and the appraisement and arbitration shall be determined, then the party of the second part is hereby authorized and empowered in the same manner as in the first instance to forthwith thereafter appoint some person, having the qualifications hereinbefore set forth, to act in the place and stead of the one theretofore appointed but being unable to act; and so, in like manner, in case the person appointed by the four other appraisers, as the fifth appraiser, shall die or refuse or fail or become unable to act as appraiser and arbitrator as herein provided, before all the matters referred to above are determined, then the four persons then acting as arbitrators and appraisers shall forthwith thereafter appoint a person having the qualifications aforesaid, as appraiser and arbitrator in the place and stead of the one theretofore appointed and whose death, failure or refusal to act has prevented him from participating in such appraisement, and said fifth appraiser as appointed shall have the same authority and power as was conferred upon the person theretofore appointed.

10. It is further hereby agreed that all costs and expenses incurred by reason of the appraisement, arbitration and special election hereby had and made under this agreement and under the terms and provisions of said contract, shall be borne by the parties hereto equally.

147 11. It is further hereby agreed that the parties hereto respectively shall produce before said appraisers and arbitrators while considering said matters, all books, deeds, papers, accounts, vouchers, writings and documents within their possession or under their control or under the control or in the possession of their allied corporations and associations or any person connected with them, which the said Board of Appraisers and Arbitrators may require, call for or request, bearing upon and properly relating to the matters submitted to said appraisers and arbitrators for consideration, and said appraisers and arbitrators may require and call for and request said matters and things from time to time as in their judgment they may deem desirable.

12. It is hereby further agreed that said appraisers and arbitrators shall be at liberty to and are hereby authorized and empowered to proceed, without the party or parties failing to attend before them, in case of the non-attendance of the parties to this agreement, or any of them, or any of the witnesses or representatives of the parties to this agreement, or any of them, or in case of the failure on the part of said parties, or either of them, to produce any books, deeds, papers, accounts, vouchers, writings, or other documents within their possession or under their control or under the control of their allied or auxiliary corporations or associations, or any person connected with them, which the said board of appraisers and arbitrators shall call for or request, after three (3) days' previous notice in writing, under the hands of the members of said board given to the said parties or witnesses and their designated representatives notifying them to produce such books, deeds, vouchers,

148 papers, accounts, writings or other documents, and of the time and place where the same are to be produced.

13. It is hereby agreed and provided that the said respective parties hereto shall each pay the appraisers named by them, and shall share and pay equally the amount of the fifth appraiser as herein provided for.

It is hereby agreed that the said appraisers and arbitrators shall have the power if in their opinion it shall be necessary to employ an accountant to assist them, and that all other necessary aid and assistance required by said appraisers and arbitrators shall be furnished by and at the expense of the parties of the first and second parts hereto.

In witness whereof, the party of the first part has caused these presents to be signed by its Mayor, attested by its Clerk, and its corporate seal to be hereunto affixed, and the party of the second part, being duly and legally authorized thereunto, has caused these presents to be signed by its President, attested by its Secretary, and its corporate seal to be hereunto affixed this — day of ——, A. D. 1907.

SECTION 2. The Mayor of the City and County of Denver is hereby authorized, empowered and directed to subscribe said agreement herein adopted and hereinbefore set forth in Section one (1) hereof, and the City Clerk of the City and County of Denver is hereby authorized, empowered and directed to attest such act of said Mayor and to affix to said contract the seal of the City and County of Denver, and the Auditor of the City and County of Denver is hereby authorized, empowered and directed to countersign and register said contract.

149 SECTION 3. The Mayor of said City and County of Denver, the President of the Board of Supervisors and the President of the Board of Aldermen are hereby named, constituted and appointed a committee of three and are hereby authorized, empowered and directed to name and appoint the appraisers and arbitrators provided for in said agreement and set forth in Section one (1) hereof to be appointed and named by the said the City and County of Denver,

SECTION 4. The Denver Union Water Company within ten days after the passage and publication of this ordinance shall sign and subscribe said contract and agreement herein recited, and adopted and set forth in Section one (1) hereof, and upon its failure so to do this ordinance and contract shall become null and void.

JOHN CONLON,
President of the Board of Aldermen.
A. J. SPENGEL,
President of the Board of Supervisors.

Signed and approved by me this 2nd day of October, A. D. 1907.

R. W. SPEER,
Mayor.

Attested by the undersigned with the corporate seal of the City and County of Denver.

[SEAL.] E. E. SOMMERS,
Clerk of the City and County of Denver.

150 "EXHIBIT D."

(*Charter Amendment Section* 264A.)

SECTION 264-*a*. Nothing in the preceding sections or in this charter, except as herein specifically provided, shall apply to the acquisition or operation of a water works or supplying the City and County of Denver and its inhabitants with water for all uses and purposes, but a public utilities commission is hereby created, to consist of three members, to have complete charge and control thereof, and to have and exercise all the powers given to the board of public works in Chapter IX, as to all public utilities. Except as herein provided, each member of said commission shall be elected for a term of six years and shall serve until his successor is elected and qualifies, and his salary shall be four thousand dollars per annum, payable in equal monthly installments by the treasurer out of the general fund upon the warrant of the commission, and Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows are hereby elected as the first members of said commission to serve, in the order named, from the date of their election to June 1, 1912, June 1, 1914, and June 1, 1916, respectively, and until their successors are elected and qualify. The names of all candidates hereafter nominated for members of said Commission shall appear on the official ballot without any party designation in connection therewith. Each commissioner shall give bond in the sum of $10,000 in the manner provided in section 152 of the charter. Said commission shall have power to employ a secretary and such legal and technical help as it may deem necessary, and shall, subject to the civil service provisions of
151 this charter, hire all other employés, and shall fix and pay all salaries and wages and shall fix and collect all rates and charges for any service under its control, which rates and charges shall be made as low as good service will permit. Said commission may adopt reasonable rules and regulations with reference to such service. It shall make an itemized monthly statement of all moneys received and paid out by it, a copy of which it shall file with the city auditor, and shall daily turn over to the city treasurer, as provided in section 260, the money received by it, said money to be paid out by the treasurer only upon the warrant of said commission. Said commission shall have and exercise all the powers of the city and county granted in the constitution or named in the charter in the matter of constructing, purchasing, condemning and purchasing, acquiring, leasing, adding to, maintaining, conducting and operating a water plant or system for all uses and purposes and everything pertaining or deemed necessary or incidental thereto. It shall institute and defend all litigation affecting its duties and powers or in relation to its trusts and all expenses thereof shall be paid by the treasurer out of the general fund upon the warrant of the commission, and it may also call to its assistance the city attorney or any other department of the city government. Except as in this section provided, the city and county shall never purchase or acquire or

exercise any option, right, privilege or power of purchasing or acquiring any water plant or system from any person, persons or corporation except upon a vote of the qualified electors first had and obtained authorizing the same, and wherever in any ordi-
152 nance or contract the former City of Denver was given the right, or the city and county now has the privilege or power to purchase or acquire any water system or plant or to extend any contract with reference thereto, the term "city" used in any such ordinance or contract shall be taken and held to mean the qualified electors of the city and county and not otherwise. No plant owned, acquired or constructed by the city and county and no water rights owned or acquired by the city and county shall ever be sold, leased or otherwise disposed of except upon a vote of the qualified electors first had and obtained, and the same shall be under the sole control and management of said commission. Any member of said commission may be recalled and his successor named at any time in the manner provided by the recall section of this charter. Any vacancy shall be filled by the remaining members of the commission and such appointee shall serve until the next municipal election and until his successor is elected and qualifies. Upon a vote of the taxpaying electors authorizing the same, as hereinafter provided, the City and County of Denver shall and it does hereby authorize the creation of an indebtedness in the sum of eight million dollars to provide a municipal water plant or system and everything incidental or necessary thereto for supplying the city and county and its inhabitants with water for all uses and purposes, said indebtedness to be evidenced by its bonds of the par value of eight million dollars, in convenient denominations of not more than one thousand dollars each and bearing four and one-half per centum interest per annum of such date and in such form and maturing at such times as
153 may be prescribed by said commission. The council shall pass such ordinances as said commission may deem necessary respecting the issuance of said bonds or to the full exercise of all the powers given it, in the form recommended by the commission, and without amendment, and the mayor shall sign the same. Said commission shall issue said bonds only from time to time as they are required for actual use or sale, and the mayor shall sign them and the clerk shall sign and attest them under the seal of the city and the auditor shall register them, with the approval of the president of said commission endorsed thereon. No such bonds shall be used or sold at less than par, nor sold except after advertisement as in this charter provided for the sale of public improvement bonds, and they may be called for redemption and redeemed by the commission in like manner as provided in section 314. If The Denver Union Water Company shall place in escrow with the Continental Trust Company of Denver, on or before July 1, 1910, a good and sufficient deed of conveyance from said water company to the City and County of Denver for all the property of every description included and embraced in the appraisement made under Ordinance 163, series of 1907, free and clear of all liens, encumbrances, claims and demands of every kind and character, accompanied by a valid surrender and release of any and all rights, claims and demands said

company or any of its subsidiary, associated or affiliated companies may have against the city and county or against any of said property, with direction in writing to deliver the same to said commission in exchange for seven million dollars of said bonds at par, then
154 the commission shall file its acceptance with said trust company and the same shall constitute a binding contract of purchase. In that event then at a special election which the council shall call within sixty days after the adoption of this amendment, to be held on the first Tuesday in September, 1910, there shall be submitted to the qualified taxpaying electors the question of issuing the said eight million dollars in bonds, of which seven million dollars at par shall be delivered to said trust company as aforesaid and the other one million dollars of bonds, or so much thereof as may be deemed necessary, shall be sold or used by the commission to improve, repair and add to the water plant so purchased. The ballot shall have printed on it the words "For the issuance of Eight Million Dollars in bonds for the Purchase and Repair of the existing Water Plant under the provisions of section 264-*a* of the Charter," and on a separate line the words, "Against the issuance of Eight Million Dollars in bonds for the Purchase and Repair of the existing Water Plant under the provisions of section of 264-*a* of the Charter." with a space opposite each such line in which the voter may make his mark indicating his vote. In case The Denver Union Water Company shall fail or refuse to fully comply with all the foregoing provisions as to the things to be done and performed by it, then at the special election aforesaid in lieu of the foregoing question, there shall be submitted to the qualified taxpaying electors on the ballot the question of issuing eight million dollars in bonds to be sold or used to construct and put into operation a complete system of water works for supplying said city and county and the inhabitants thereof with water for all uses and purposes. Said ballot
155 shall have printed on it the words, "For the issuance of Eight Million Dollars in bonds for the Construction of a new Municipal Water Plant," and on a separate line the words, "Against the Issuance of Eight Million Dollars in bonds for the Construction of a new Municipal Water Plant," with a space opposite each such line in which the voter may make his mark indicating his vote. Such bonds, or so much thereof as the commission may deem necessary, shall be sold or used, by it to construct and put into operation a complete system of water works for supplying said city and county and its inhabitants with water for all uses and purposes, and said commission shall forthwith proceed to construct the same. The said commission shall, immediately upon its election, in case The Denver Union Water Company has not accepted the seven million dollars in bonds for its plant as aforesaid, proceed to make a careful investigation of the value of said plant for the uses and purposes of the City and County of Denver and its inhabitants, and also proceed to make a careful estimate of the cost of constructing a complete new water system for the City and County of Denver and the inhabitants thereof and may submit an alternative bond proposition at said special election for the issuance of bonds in such sum as it

may deem advisable for the acquisition or construction of a water plant or any part thereof by any of the ways within its powers herein mentioned, and the same shall be placed on said ballot in such form as said commission may determine, and it may also submit any proposition concerning its powers or trust at any municipal election in like manner. If a majority of the votes cast thereon shall
156 be in favor of any proposition submitted it shall thereby be adopted, and in case alternative propositions are submitted, and each receive a majority, then the one receiving the greater affirmative vote shall be the one adopted. Such adoption shall be a sufficient authorization for the issuance of the bonds thereby provided for the same, when issued, shall be and constitute an indebtedness of the City and County of Denver for the purposes aforesaid, and the provisions in this section relative to the issue, sale and redemption of bonds shall apply thereto. Any provisions of the charter in conflict herewith is hereby repealed.

157 "EXHIBIT E."

Ordinance No. 98.

Series 1910.

Supervisors' Bill No. 46.

Introduced by Supervisor McGauran.

A bill for an ordinance calling a special election to be held on the first Tuesday in September, 1910, at which election—in the event that The Denver Union Water Company shall have placed in escrow with the Continental Trust Company of Denver on or before July 1, 1910, a good and sufficient deed of conveyance from said Water Company to the City and County of Denver for all the property of every description included and embraced in the appraisement made under Ordinance 163, series of 1907, free and clear of all liens, encumbrances, claims and demands of every kind and character, accompanied by a valid surrender and release of any and all rights, claims and demands said company or any of its subsidiary, associated or affiliated companies may have against the City and County or against any of said property, with direction in writing to deliver the same to the public utilities commission in exchange for seven million dollars in bonds of the City and County of Denver at par, as authorized in section 264-*a* of the charter of said city, and the said public utilities commission shall have filed its acceptance with said trust company—there shall be submitted to the qualifying taxpaying electors of said City and County the question of issuing eight million dollars in bonds of the character described in said section 264-*a*, of which seven million dollars
158 at par shall be delivered to said trust company as aforesaid, and the other one million dollars of bonds or so much thereof as may be deemed necessary shall be sold or used by the said com-

mission to improve, repair and add to the water plant so purchased; and in case The Denver Union Water Company shall have failed or refused on or before July 1, 1910, to comply fully with all the foregoing provisions as to the things to be done and performed by it, then at the special election aforesaid in lieu of the foregoing question there shall be submitted to the qualified taxpaying electors on the ballot the question of issuing eight million dollars in bonds to be sold or used to construct and put into operation a complete system of water works for supplying said City and County of Denver and the inhabitants thereof with water for all uses and purposes; also, providing for the form of submission of either of said questions upon the ballot; also providing for the discharge of their duties severally by all officials charged by law with any duty, relating to such special election; also providing for the submission at such special election upon the certificate of the public utilities commission of an alternative bond proposition for the issuance of bonds in such sum as it may deem advisable for the acquisition or construction of a water plant or any part thereof, by any of the ways within its powers mentioned in said section 264-*a*, and placing the same upon the ballot in such form as said commission may determine.

Be it Enacted by the Council of the City and County of Denver:

SECTION 1. That there be and is hereby called, pursuant to the provisions of section 264-*a* of the Charter of the City and
159 County of Denver a special election, to be held on the first Tuesday of September, 1910, in the City and County of Denver, at which election there shall be submitted to the qualified taxpaying electors of said City and County the questions hereinafter set forth.

SECTION 2. If the Denver Union Water Company shall have placed in escrow with The Continental Trust Company of Denver, on or before July 1, 1910, a good and sufficient deed of conveyance from said Water Company to the City and County of Denver for all the property of every description included and embraced in the appraisement made under Ordinance 163, series 1907, free and clear of all liens, encumbrances, claims and demands of every kind and character, accompanied by a valid surrender and release of any and all rights, claims and demands said Company or any of its subsidiary, associated or affiliated companies may have against the City and County or against any of said property, with direction in writing to deliver the same to said Commission in exchange for seven million dollars of bonds at par of the character described in said section 264-*a* of the Charter, and the Commission shall have filed its acceptance with said Trust Company—then and in that event, at such special election hereby called and so to be held as aforesaid, there shall be submitted to the qualified taxpaying electors the question of issuing the said eight million dollars in bonds, of which seven million dollars at par shall be delivered to said Trust Company as aforesaid and the other one million dollars of bonds, or so much thereof as may be deemed necessary, shall be sold
160 or used by the Commission to improve, repair and add to the water plant so purchased. The ballot shall have printed on

it the words, "For the issuance of Eight Million Dollars in bonds for the Purchase and Repair of the existing Water Plant under the provisions of section 264-*a* of the Charter," and on a separate line the words, "Against the issuance of Eight Million Dollars in bonds for the Purchase and Repair of the existing Water Plant under the provisions of section 264-*a* of the Charter," with a space opposite each such line in which the voter may make his mark indicating his vote.

SECTION 3. In case The Denver Union Water Company shall fail or refuse to fully comply with all the foregoing provisions as to the things to be done and performed by it, then at the special election aforesaid, in lieu of the foregoing questions, there shall be submitted to the qualified taxpaying electors on the ballot the question of issuing eight million dollars in bonds to be sold or used to construct and put into operation a complete system of water works for supplying said City and County and the inhabitants thereof with water for all uses and purposes. Said ballot shall have printed on it the words, "For the issuance of Eight Million Dollars in bonds for the Construction of a new Municipal Water Plant," and on a separate line the words, "Against the Issuance of Eight Million Dollars in bonds for the Construction of a new Municipal Water Plant," with a space opposite each such line in which the voter may make his mark indicating his vote.

SECTION 4. In the event that the first of said questions, to-wit, that mentioned in section 2 hereof, shall be submitted, then
161 voters wishing to vote in the affirmative and in favor of purchase shall put a cross-mark X in the space opposite the words, "For the Issuance of eight million dollars in bonds for the purchase and repair of the existing water plant, under the provisions of section 264-*a* of the Charter," and voters wishing to vote in the negative and against the issuance of bonds for such purchase shall put a cross-mark X in the space opposite the words, "Against the issuance of eight million dollars in bonds for the purchase and repair of the existing water plant under the provisions of section 264-*a* of the Charter."

SECTION 5. In the event that the second of said questions, to-wit, that mentioned in section 3 hereof, shall be submitted at said election then voters wishing to vote in the affirmative and in favor of the construction of a new municipal water plant shall put a cross-mark X in the space opposite the words, "For the issuance of eight million dollars in bonds for the construction of a new municipal water plant," and voters wishing to vote in the negative and against issuance of bonds for the construction of a new Municipal water plant shall put a cross-mark X in the space opposite the words "Against the issuance of eight million dollars in bonds for the construction of a new municipal water plant."

SECTION 6. That said Public Utilities Commission may certify for submission at said special election, and to be printed on the ballot therefor, an alternative bond proposition for the issuance of bonds in such sum as it may deem advisable for the acquisition or construction of a water plant or any part thereof, by any of the

ways within its powers in said section 264-*a* mentioned, and
162 said alternative bond proposition shall be placed on said ballot in such form as said Commission may determine.

SECTION 7. The officers of election in the several voting precincts shall receive no ballots at said special election, upon either of the propositions hereinbefore described, except from taxpaying electors.

SECTION 8. The special election hereby called for the first Tuesday in September, 1910, shall be held, had and conducted in the various precincts of the City and County of Denver between the hours of 7 o'clock in the morning and 7 o'clock in the evening, and according to the provisions of the Constitution and laws of the State and the Charter of the City and County of Denver.

SECTION 9. The clerks of election shall be furnished with appropriate tally books with proper designations and shall set forth therein the votes cast at said election on the different propositions submitted, and the votes so cast shall be canvassed and returned and the returns thereof declared in the same manner as near as may be as is provided for the canvass, return and declaring of the votes at a general election for candidates.

SECTION 10. The clerks of the City and County, the election commission and such other officials as are charged with duties relating thereto shall for said election, make such publications and give such notices and make such appointments, and do all acts and things in such manner and form and at such times as are prescribed by the Constitution and laws of the State of Colorado, and by the Charter of the City and County of Denver. The votes cast at
163 & 164 said election shall be canvassed, and the result ascertained, determined and certified in accordance with the requirements of the Constitution and laws of the State of Colorado and the Charter of the City and County of Denver.

W. M. ROBERTSON,
President of the Board of Supervisors.
JOHN CONLON,
President of the Board of Aldermen.

Signed and approved by me this 6th day of July, 1910.

R. W. SPEER, *Mayor.*

Attested by the undersigned with the corporate seal of the City and County of Denver.

[SEAL.]

BURT F. DAVIS,
Clerk of the City and County of Denver,
By J. A. DOWSON,
Deputy Clerk.

165 (Endorsed.)

In the Circuit Court of the United States within and for the District of Colorado. In Equity.

No. 5572.

THE NEW YORK TRUST COMPANY, a Corporation, Complainant,
vs.
THE CITY AND COUNTY OF DENVER, a Municipal Corporation; Robert W. Speer, as Mayor of the City and County of Denver; Burt F. Davis, as Clerk of said City and County of Denver; Albion K. Vickery, as Auditor of said City and County of Denver; Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows, as Members of and Constituting the Public Utilities Commission of said City and County of Denver; Ellis Meredith, A. F. Mauff and Harry Petrie, as Members of and Constituting the Election Commission of said City and County of Denver; The Denver Union Water Company, a Corporation; and The South Platte Canal and Reservoir Company, a Corporation, Defendants.

Bill of Complaint.

Index.

	Page
Bill of Complaint	1
Exhibit A—Ordinance No. 44 of 1890	57
Exhibit B—Mortgage Denver Union Water Co. to Continental Trust Co., of New York	79
Exhibit C—Ordinance No. 163 of 1907	131
Exhibit D—Charter Amendment, Section 264 A	150
Exhibit E—Ordinance No. 98 of 1910	157

Filed Aug. 22, 1910. Charles W. Bishop, Clerk.

166 UNITED STATES OF AMERICA,
District of Colorado, ss:

In the Circuit Court of the United States for the District of Colorado, Sitting at Denver.

The President of the United States of America to The City and County of Denver, Robert W. Speer, as mayor of the city and county of Denver, Burt F. Davis, as clerk of said city and county of Denver, Albion K. Vickery, as auditor of said city and county of Denver, Armour C. Anderson, Edwin Van Cise and Lincoln Fellows, as members of and constituting the Public Utilities Commission of said city and county of Denver, Ellis Meredith, A. E. Mauff, and Harry Petrie, as members of and constituting the Election Commission of said city and county of Denver, The Den-

ver Union Water Company, The South Platte Canal and Reservoir Company, Greeting:

You and Each of you are Hereby Commanded, that you appear before the Judges of the circuit court of the United States, for the district of Colorado, at the city and county of Denver, in said district, on the first Monday in October next (it being the third day of October, A. D. 1910) to answer the bill of complaint of The New York Trust Company this day filed in the office of the clerk of said court, in said city and county of Denver, then and there to receive and abide by such judgment and decree as shall then or thereafter be had upon said bill of complaint, upon pain of judgment being pronounced against you by default, and a decree had and entered accordingly.

To the Marshal of the District of Colorado to execute and make due return.

Witness the Honorable John M. Harlan, Associate Justice of the United States, and the seal of the said circuit court, at the city and county of Denver aforesaid, this twenty-second day of August, in the year of our Lord one thousand nine hundred and ten, and of the Independence of the United States the 135th year.

[Seal U. S. Circuit Court.]

CHARLES W. BISHOP, *Clerk,*
By ALBERT TREGO,
Deputy Clerk.

Memorandum.

The above named defendants are hereby notified that unless they, and each of them, shall enter their appearance in the office of the clerk of said court, at the city and county of Denver aforesaid, on or before the day to which the above writ is returnable,
167 the bill of complaint will be taken against them as confessed, and a decree entered accordingly.

CHARLES W. BISHOP, *Clerk.*
By ALBERT TREGO,
Deputy Clerk.

UNITED STATES OF AMERICA,
District of Colorado:

I hereby certify and return that I have duly served the attached writ upon the within named defendant, The Denver Union Water Company by handing to and leaving with D. H. Moffat as president of said company a true and correct copy of this writ. As to The South Platte Canal and Reservoir Company by handing to and leaving with W. P. Robinson, as president of said company, a true and correct copy of this writ; as to Armour C. Anderson by handing to and leaving with him personally as a member of the Public Utilities Commission, a true and correct copy of this writ. All services made at Denver, county of Denver, August 23rd, 1910.

D. C. BAILEY, *U. S. Marshal,*
By THOMAS CLARKE, *Deputy.*

UNITED STATES OF AMERICA,
District of Colorado:

I hereby certify and return that I have duly served the attached writ upon the therein named defendant, The City and county of Denver, by handing to and leaving with Robert W. Speer as mayor of said city and county a true and correct copy of this writ; as to Robert W. Speer, as mayor of said city and county, by handing to and leaving with him personally a true and correct copy of this writ; as to Burt F. Davis, as clerk of said city and county, by handing to and leaving with him personally, a true and correct copy of this writ. Said services being made at Denver in said district, August 22nd, 1910.

As to Albion K. Vickery, as auditor of said city and county; Edwin Van Cise and Lincoln Fellows, as members of the Public Utilities Commission of said city and county; Ellis Meredith, A. E. Mauff, and Harry Petrie, as members of the Election Commission of said city and county, by handing to and leaving with each of them, personally, a true and correct copy of this writ, on August 23rd, 1910, at Denver in said district.

D. C. BAILEY, *U. S. Marshal,*
By E. B. CHADWICK, *Deputy.*

168 Endorsed: No. 5572. United States Circuit Court for the District of Colorado. In Chancery. The New York Trust Company vs. The City and County of Denver, et al. Subpœna returnable to rule day, first Monday in October, A. D. 1910. Charles W. Bishop, Clerk. Filed Aug. 25, 1910. Charles W. Bishop, Clerk. Vaile, McAllister and Vaile, Solicitors for complainant.

Fifty-fourth Day, May Term.

MONDAY, *August 22nd, A. D.* 1910.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the third day of May, A. D. 1910.

5572. In Chancery.

THE NEW YORK TRUST COMPANY,
vs.
THE CITY AND COUNTY OF DENVER, ROBERT W. SPEER, as Mayor of the City and County of Denver; Burt F. Davis, as Clerk of said City and County of Denver; Albion K. Vickery, as Auditor of said City and County of Denver; Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows, as members of and constituting The Public Utilities Commission of said City and County of Denver; Ellis Meredith, A. E. Mauff and Harry Petrie, as members of and constituting The Election Commission of said City and County of Denver; The Denver Union Water Company and the South Platte Canal and Reservoir Company.

Bill for Injunction and for Other Relief.

Upon motion of the complainant, it is ordered that complainant's motion for injunction filed herein, be, and the same hereby is set

for hearing before the court at Denver, Colorado, upon Wednesday, the 31st day of August, 1910, at 10 o'clock a. m., and that notice of such application and hearing be forthwith served upon all of the defendants.

169 In the Circuit Court of the United States Within and for the District of Colorado.

In Equity. No. 5572.

THE NEW YORK TRUST COMPANY, a Corporation, Complainant,
vs.
THE CITY AND COUNTY OF DENVER, a Municipal Corporation; Robert W. Speer, as Mayor of the City and County of Denver; Burt F. Davis, as Clerk of said City and County of Denver; Albion K. Vickery, as Auditor of said City and County of Denver; Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows, as Members of and Constituting the Public Utilities Commission of said City and County of Denver; Ellis Meredith, A. E. Mauff and Harry Petrie, as Members of and Constituting the Election Commission of said City and County of Denver; The Denver Union Water Company, a Corporation, and The South Platte Canal and Reservoir Company, a Corporation, Defendants.

The Answer of The Denver Union Water Company, One of the Defendants Above Named, to the Bill of Complaint of The New York Trust Company.

This defendant, now and at all times hereafter saving to itself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, un-
170 certainties and imperfections in the said bill contained, for answer thereto, or to so much thereof as this defendant is advised it is material or necessary for it to make answer unto, answering says:

First. This defendant admits the allegations, and each thereof, contained in paragraph first of said bill of complaint.

Second. This defendant admits the citizenship and residence of each of the parties mentioned in paragraph second of said bill of complaint, as therein alleged; but denies that the said Armour C. Anderson, the said Edwin Van Cise or the said A. Lincoln Fellows, or any or all of them, are members of or constitute the Public Utilities Commission of said City and County of Denver; and further denies that any such Commission exists; but admits that the said Anderson, Van Cise and Fellows are claiming and pretending to be members of and to constitute such Public Utilities Commission, and are attempting to act as such.

Third. This defendant admits the allegations, and each thereof, contained in paragraph third of said bill of complaint, except that it denies that the said Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows, or either of all of them, are the duly elected or qualified or acting members of the Public Utilities Commission of said

City and County of Denver; and denies that any such Commission exists; but admits that the said Anderson, Van Cise and Fellows are claiming and pretending to constitute such a Commission, and are attempting to act as such.

Fourh. This defendant admits the allegations, and each thereof, contained in paragraph fourth of said bill of complaint.

171 Fifth. This defendant admits the allegations, and each thereof, contained in paragraph fifth of said bill of complaint.

Sixth. This defendant admits the allegations, and each thereof, contained in paragraph sixth of said bill of complaint.

Seventh. This defendant admits the allegations, and each thereof, contained in paragraph seventh of said bill of complaint.

Eighth. This defendant admits the allegations, and each thereof, contained in paragraph eighth of said bill of complaint.

Ninth. This defendant admits the allegations, and each thereof, contained in paragraph ninth of said bill of complaint.

Tenth. For answer to paragraph tenth in said bill of complaint contained, this respondent admits the due passage and approval of said Ordinance No. 163 of the Series of 1907, as therein alleged; and the due acceptance of the same by this defendant, and the making and execution of the contract therein authorized and contemplated, both by this defendant and also by said The City and County of Denver; and admits that said Exhibit C attached to the bill of complaint is a true copy of said ordinance and of said contract; but avers that, by reason of the acts and transactions hereinafter more fully set forth, and under and by virtue of the existing contract relations with The City and County of Denver, this defendant is entitled to a renewal of, and said the City and County of Denver is obligated to renew, said ordinance No. 44 of the Series of 1890, as therein provided, for an additional period of twenty years from and after April 10th, A. D. 1910, all as more

172 fully hereinafter set forth and explained; and avers that it is to the best interest of this defendant and its stockholders, and not to the detriment of the said complainant or the holders or owners of bonds secured by the deed of trust or mortgage in which it is trustee, that said right of renewal, rather than said purchase by the city be insisted upon and enforced, all as hereinafter more fully set forth. But this defendant admits each and every other allegation not hereinabove specifically admitted, denied or avoided, which is contained in said paragraph tenth of said bill of complaint.

Eleventh. For answer to paragraph eleventh in said bill of complaint contained, this defendant admits each and every allegation therein contained, except that it denies the due passage or adoption, as well as the validity of said provision denominated Section 264-A of the Charter of the City and County of Denver; and denies that any such Charter amendment has ever been duly, properly or at all adopted; and denies that the same or any part thereof, is now or at any time was a part of the Charter of said City and County of Denver; and denies the validity of the same, or of any part thereof, for the reasons hereinafter more fully set forth; but this defendant admits that the said City and County of Denver, and the said per-

sons claiming and pretending to constitute said the Public Utilities Commission are claiming and pretending that said provision has been heretofore duly, legally and properly adopted as an amendment to the Charter of said City and County of Denver, and that it now constitutes such amendment and is now a part of said Charter, under which they, and each of them, are claiming, pretending and attempting to act as though by authority of a valid Charter
173 amendment. But defendant avers, as it has hereinbefore alleged, and as is hereinafter more fully set forth and explained, that said The City and County of Denver is now obligated to renew said Ordinance No. 44, as therein provided, and this defendant is entitled to, and insists upon, said renewal. Further answering said paragraph eleventh, this defendant admits each and every allegation therein contained, not hereinabove expressly admitted, denied or avoided.

Twelfth. For answer to paragraph Twelfth in said bill of complaint contained, this defendant denies the due passage or adoption, as well as the validity of said provision denominated 264A of the Charter of The City and County of Denver, and denies that any such Charter amendment has ever been duly, properly, or at all, adopted, and denies that the same, or any part thereof is now, or at any time was, a part of the Charter of said The City and County of Denver, and denies the validity of the same, or any part thereof. But this defendant admits that said The City and County of Denver and persons claiming and pretending to constitute said The Public Utilities Commission are claiming and pretending that said provision has been heretofore duly, legally and properly adopted as an amendment to the Charter, and that it now constitutes such amendment and is now a part of said Charter, under which they, and each of them, are claiming, pretending, attempting and assuming to act as though by authority of a valid Charter amendment. This defendant admits each and every other allegation, matter and thing in said paragraph Twelfth of said bill of complant set forth.

174 Thirteenth. This defendant admits each and every allegation, matter and thing contained or set forth in paragraph Thirteenth of said bill of complaint; but avers, as it has heretofore averred, that said The City and County of Denver is, and was at the time of the filing of the bill of complaint herein, obligated to renew and that defendant is entitled to have and to insist upon, and does insist upon, a renewal of said Ordinance No. 44 of the Series of 1890, according to its terms, as hereinafter more fully explained and set forth.

Fourteenth. This defendant admits each and every allegation, matter and thing contained or set forth in paragraph Fourteenth of said bill of complaint; but avers, as it has heretofore averred, that said The City and County of Denver is, and was at the time of the filing of the bill of complaint herein, obligated to renew, and that defendant is entitled to have and to insist upon, and does insist upon, a renewal of said Ordinance No. 44 of the Series of 1890, according to its terms, as hereinafter more fully explained and set forth.

Fifteenth. This defendant admits each and every allegation, matter and thing contained or set forth in paragraph Fifteenth of said bill or complaint, except that it denies the adoption or validity of said Section 264A, and avers, as it has heretofore averred, that said The City and County of Denver is, and was at the time of the filing of the bill of complaint herein, obligated to renew, and that this defendant is entitled to have and to insist upon, and does insist upon, a renewal of said Ordinance No. 44 of the Series of 1890, according to its terms, as hereinafter more fully explained and set forth.

175 Sixteenth. This defendant admits each and every allegation, matter and thing in paragraph Sixteenth of said bill of complaint contained or set forth; but avers, as heretofore averred, that said The City and County of Denver is, and was at the time of the filing of the bill of complaint herein, obligated to renew, and that this defendant is entitled to have and to insist upon, and does insist upon, a renewal of said Ordinance No. 44 of the Series of 1890, according to its terms, as hereinafter more fully explained and set forth.

Seventeenth. This defendant admits each and every allegation, matter and thing in paragraph Seventeenth of said bill of complaint contained or set forth.

Eighteenth. This defendant admits each and every allegation, matter and thing contained or set forth in paragraph Eighteenth of said bill of complaint.

Nineteenth. For answer to paragraph Nineteenth in said bill of complaint contained, this defendant denies that by reason of its attitude, contentions, acts or omissions, as therein set forth, or any other acts or omissions on its part, said complainant, as Trustee in said deed of trust or mortgage, or the holders or owners of the bonds secured thereby, or any thereof, have been or will be injured or damaged; but avers, that the injury and damage heretofore suffered and now threatened and likely to occur arises, and will arise, from and be occasioned by the wrongful, illegal, inequitable and unconscionable acts of the defendants The City and County of Denver, The Public Utilities Commission and the members thereof, and their officers, agents and representatives,

176 and other inhabitants of the City and County of Denver, as hereinafter more fully set forth. But otherwise, this defendant admits each and every allegation, matter and thing contained or set forth in said paragraph Nineteenth.

Twentieth. For answer to paragraph Twentieth in said bill of complaint contained, this defendant avers that The City and County of Denver is obligated to renew, and this defendant is entitled to, and insists upon, the renewal of said Ordinance No. 44 of the Series of 1890, in accordance with its terms, as hereinafter more fully explained and set forth; and believes and avers that it is, and will be, to the best interest of all concerned that said renewal be made effective, and said contract be fully carried out and performed for the additional period of twenty years from and after April 10, A. D. 1910, provided said The City and County of Denver be required on

its part to recognize said renewal and right of renewal, and to abide by and fully perform, observe and carry out all of the obligations on it resting in that event, and this defendant is willing, and hereby offers, to fully perform, fulfill and carry out all of the terms of all existing contracts between this defendant and said The City and County of Denver and the inhabitants thereof and said complainant, and the bond holders which it represents, as the same may in this cause be finally construed and determined to be and exist, all as hereinafter more fully explained and set forth. And otherwise, this defendant admits each and every allegation, matter and thing in said paragraph Twentieth of said bill of complaint contained or set forth.

177 Twenty-first. For answer to paragraph Twenty-first in said bill of complaint contained, this defendant admits each and every allegation in said paragraph set forth.

Twenty-second. For answer to paragraph Twenty-second in said bill of complaint contained, this defendant admits each and every allegation in said paragraph set forth.

Twenty-third. Further answering said bill of complaint, this defendant avers that it is the successor to The Denver Water Company, mentioned in said Ordinance No. 44 of the Series of 1890, a copy of which is attached to said bill of complaint as "Exhibit A," and that the defendant The City and County of Denver, as a municipal corporation, is the successor to said The City of Denver mentioned in said ordinance; that said Ordinance No. 44 of the Series of 1890 has been at all of the times mentioned in said bill of complaint and is now the valid, subsisting and mutually binding and obligatory contract between this defendant and its said predecessor The Denver Water Company, and said defendant, The City and County of Denver, in respect to the furnishing of a supply of water for all purposes by this defendant and its said predecessor to said The City and County of Denver and its said predecessor and the inhabitants thereof, except as the same may have been modified by the subsequent Ordinance No. 163 of the Series of 1907 hereinafter mentioned; that in and by said Ordinance No. 44 of the Series of 1890, as appears from the copy thereof marked "Exhibit

178 A," and attached to the bill of complaint herein, it was and is agreed and set forth that the rights and privileges thereby granted should terminate, cease and be at an end at the expiration of the period of twenty years from and after the date of passage and approval of said ordinance, in case the said City should then elect to and should purchase the said water works system and plant of said The Denver Water Company or its successor, this defendant; and in case the parties should fail to agree upon the price to be paid by the City for the water works of the said Company or its successors or assigns, then their fair cash value should be determined by arbitration or appraisement as in said ordinance specified; that in and by said ordinance, as more fully appears from the copy thereof attached to said bill of complaint, and marked "Exhibit A," it was further provided that at the expiration of said period of twenty years the said City should, unless it purchased as aforesaid,

renew the contract thereby made, by ordinance to that effect, for a like period of twenty years, but at a price for hydrant rental ten per cent. less than mentioned in Section 10 of said Ordinance No. 44 of the Series of 1890, for the period remaining after the ten years after May 1, 1891, and for successive periods of twenty years at the price last aforesaid, as often and as long as the City might choose; and in and by said ordinance it was further provided, among other things, that all mains, pipes, valves and other apparatus then owned by said The Denver Water Company, and composing its plant, and all such mains, pipes, valves, hydrants and other apparatus as said The Denver Water Company, its successors or assigns, should thereafter lay down or set in or upon any of
179 the streets, alleys or other public places within said City, should be and remain the sole and absolute property of said The Denver Water Company, its successors and assigns, and that said The Denver Water Company, its successors or assigns, should forever be considered and entitled to be in possession thereof, except in case of purchase by said City under the terms of said ordinance or some agreement between said City and said Company, its successors or assigns, when all rights of whatsoever nature of said Company, its successors or assigns, in and to the subject-matter thereof should vest in said City. And this defendant further avers that while the franchise or privilege conferred and conveyed by said ordinance was limited to the period of twenty years, in that it was subject to be terminated at the expiration of said period of twenty years in case the said City or its successors should then purchase and pay for the water works system or plant of said The Denver Water Company, its successors or assigns, at a price to be agreed upon or fixed by arbitration or appraisement as in said ordinance contemplated, yet, in and by said ordinance and contract it was and is agreed that in case of the failure of said City or its successor to purchase and pay for said water works system or plant as therein provided, then and in that event it was and is agreed and provided that the franchise or privilege conveyed or conferred thereby should be renewed for an additional period of twenty years; and in and by said ordinance and contract it was agreed and provided also that in such event the contract for the supply of water to said City should be renewed for an additional period of twenty years, with
180 the modification as to hydrant rental, and upon the conditions hereinabove referred to. And this defendant further avers that said ordinance contained no other limitation of the period of time during which it should continue to be in full force and effect and operative, nor any other provision whatsoever as to its termination in any manner or at all except as hereinabove set forth.

Twenty-fourth. This defendant further avers that thereafter and prior to the expiration of said period of twenty years from and after the original passage and approval of said Ordinance No. 44 of the Series of 1890, and shortly prior to the second day of October, 1907, said The City and County of Denver, as successor under said ordinance and contract to said The City of Denver, sought from this de-

fendant the privilege of exercising its right to purchase said water works plant or system prior to the expiration of said period of twenty years, as contemplated in the original Ordinance No. 44 of the Series of 1890, and likewise of causing and procuring the appraisement of the property constituting said water works system or plant and contemplated to be purchased under said Ordinance No. 44 of the Series of 1890, prior to the expiration of said twenty-year period, and for that purpose and with that end in view said The City and County of Denver caused to be enacted by its City Council and approved by its Mayor said Ordinance No. 163 of the Series of 1907, a copy of which is attached to the bill of complaint herein and marked Exhibit C; that thereafter the said contract between this defendant and said The City and County of Denver, contemplated by and set forth in said Ordinance No. 163 of the
181 Series of 1907, was duly executed by and on behalf of said The City and County of Denver as therein authorized, and was likewise, at the instance and request of said The City and County of Denver, duly executed by and on behalf of this defendant; that in and by said ordinance and said contract it was contemplated, agreed and provided that the purchase by the City of said water works system or plant, as contemplated in said original Ordinance No. 44 of the Series of 1890, and the appraisement of said property for that purpose, might be made, had and done prior to the expiration of said twenty-year period mentioned in said Ordinance No. 44 of the Series of 1890, instead of at the expiration of said period as specified in said original ordinance.

Twenty-fifth. This defendant further avers that the said appraisement contemplated in said Ordinance No. 44 of the Series of 1890, and in said Ordinance No. 163 of the Series of 1907, and the contract made and entered into pursuant to said last-mentioned ordinance, was duly had and completed as in said bill of complaint alleged, resulting in a finding that said water works system or plant was of the value of $14,400,000.00, as in said bill of complaint stated; that said finding, award and valuation was arrived at and announced on, to-wit: March 20, 1909, more than one year prior to the expiration of said twenty-year period mentioned in said Ordinance No. 44 of the Series of 1890; but that said The City and County of Denver did not at any time prior to the expiration of said period of twenty years complete said purchase of or payment for said water works system or plant at said appraised value, nor take any steps whatsoever so to do, nor has it so done at any
182 time since said date up to the present; but, on the contrary, said City and County has not only unofficially expressed its intention not to proceed further to complete said purchase, but officially, by virtue of an alleged amendment to the Charter of the City and County of Denver, to-wit: said Section 264A, has declared its intention of not proceeding further with said purchase under said appraisement, but to erect an independent, complete and competing water works system for the supplying of water to the City and County of Denver and its inhabitants; and having so as aforesaid refused, failed and declined to complete said purchase as

in Section 11 of said Ordinance No. 44 of the Series of 1890 provided, and, on the contrary, having expressly declared its intention not to so purchase, and to utterly disregard all of said acts, this defendant, The Denver Union Water Company, is entitled to a renewal of the terms of Ordinance No. 44 of the Series of 1890 for a further term of twenty years as therein provided, and said The City and County of Denver is obligated to grant such renewal, but that said The City and County of Denver refuses to acknowledge such right on behalf of this defendant, or such obligation on the part of the City and County of Denver; but, on the contrary, claims that this defendant is at the sufference and will of said City and County of Denver, and not otherwise, engaged in business within its confines, and in supplying water to it and its inhabitants. This defendant further avers that in its judgment and that of its directors and officers, said appraised valuation of $14,400,000.00 is less than the fair, reasonable and actual value of the property ap-
183 praised at the instance of and to be purchased by the City and County of Denver; that the reasonable, fair and actual value of said property does and did largely exceed said appraised value, and that if the officers and directors of this defendant should fail to insist on said right of renewal which has accrued, instead of upon the completion of said purchase, this defendant and its officers and directors would violate the trust reposed in them by the stockholders of said Company, and said stockholders and each of them would suffer great hardship and financial loss; but this defendant avers that it and its predecessors have in the past fully and in all things complied with all of the provisions and stipulations of each and every contract, agreement and understanding with said The City and County of Denver and its predecessor, and is now so complying and will continue in the future so to comply, as it understands the true meaning and effect of said contracts to be, and will and hereby offers to fully perform all of the obligations of said contracts, and each thereof, upon it resting, and as the same may be in this cause finally found and decreed to exist.

Twenty-sixth. That said Section 264-A, a true copy of which is attached to the bill of complaint herein and marked "Exhibit D," is not now and never was a part or portion of the Charter of the City and County of Denver, nor was it at said election in the month of May, 1910, or at any other time, properly or at all adopted as such, nor was it at said election properly or at all submitted to the votes of the qualified electors of said City and County of Denver, nor was it at said election nor at any time properly or at all voted, authorized or adopted by a majority of the electors qualified
184 to vote thereon, for the reason, among others, that said so-called Section 264-A was by the ordinance purporting to authorize its submission, by the notice of the election thereon and by the form in which it was printed upon the ballot and required to be voted upon by the qualified electors, submitted to such vote as an entirety, with no option, privilege or opportunity to the voter to express his will thereon except by a vote in favor of its adoption, including all of the various and sundry matters and things therein contained, expressly or by implication, or by a vote against its

adoption, which necessarily would include a vote against each and every of the several distinct propositions and things therein contained and set forth, either expressly or by implication; that said Section 264-A submitted in the manner aforesaid contained numerous, different, independent and unrelated matters not germane one to the other, nor in pari materia; that among the many different and independent matters, things and questions contained in and submitted by the proposal of said so-called amendment to the Charter were the following, to-wit:

1. The repeal of all other Charter provisions relative to the acquisition or operation of a water works, or supplying the City and County of Denver and its inhabitants with water for any and all uses and purposes.

2. The creation of a Public Utilities Commission, to consist of three members.

3. The placing in said Commission of the complete charge and control of the acquisition or operation of water works, or
185 supplying the City and County of Denver and its inhabitants with water for any and all uses and purposes.

4. The granting to said Commission of all the powers given to the Board of Public Works in Chapter IX of said Charter, as to all public utilities.

5. Fixing the term of service of the members of said Commission.

6. Fixing the salary of the members of said Commission, and its method of payment.

7. Requiring the City Treasurer to pay said salary out of the general fund, upon warrant of the Commission.

8. The election of Armour C. Anderson as a member of said Commission, without previous nomination in any manner, and to an office which did not exist at the time his name was placed upon the ballot.

9. The election of Edwin Van Cise as a member of said Commission, without previous nomination in any manner, and to an office which did not exist at the time his name was placed upon the ballot.

10. The election of A. Lincoln Fellows as a member of said Commission, without previous nomination in any manner, and to an office which did not exist at the time his name was placed upon the ballot.

11. The fixing of the terms of said first Commissioners named.

12. Providing a new form of ballot for future elections of Commissioners.

13. Requiring each Commissioner to give bond and fixing the amount.

14. Authorizing the Commission to employ a Secretary and such legal and technical help as it may deem necessary.

186 15. Authorizing the Commission to hire all other employés subject to the civil service provisions in the Charter.

16. Authorizing the Commission to fix and pay all salaries and wages of such employés.

17. Authorizing the Commission to fix and collect all rates and charges for any service under its control.

18. Authorizing the Commission to adopt reasonable rules and regulations with reference to such service.

19. Authorizing the Commission to receive and pay out moneys without previous auditing or supervision by the Auditor or any other officer or authority of the City and County of Denver, contrary to all other provisions of the Charter.

20. Requiring the City Treasurer to pay out moneys received by him from said Commission, upon warrant of said Commission.

21. Granting to said Commission all the powers of the City and County granted in the Constitution or named in the Charter in the matter of constructing, purchasing and condemning, and purchasing, acquiring, leasing, adding to, maintaining, conducting and operating a water plant or system for all uses and purposes, and everything pertaining or deemed necessary or incidental thereto.

22. Authorizing the Commission to institute and defend all litigation affecting its duties and powers, or in relation to its trusts, without consulting the City Attorney, and without availing itself of his services.

23. Requiring the City Treasurer to pay all expenses of such litigation out of the general fund, upon the warrant of the Commission.

187 24. Authorizing the Commission to call to its assistance the City Attorney or any other department of the City government.

25. Denying to the City and County of Denver the right ever to purchase or acquire or exercise any option, right, privilege or power of purchasing or acquiring any water plant or system from any person, persons or corporation, except upon a vote of the qualified electors first had and obtained authorizing the same.

26. Amending all previous ordinances and contracts of the former City of Denver, by which said City was given the right or the present City and County of Denver now has the privilege or power to purchase or acquire any water system or plant, by providing that the term "City," used in any such ordinance or contract, shall be taken and held to mean the qualified electors of the City and County, and not otherwise.

27. Amending all ordinances and contracts of the former City of Denver, whereby said City was given the right or the City and County of Denver now has the privilege or power to extend any contract with reference to any such water system or plant, by providing that the term "City," used in any such ordinance or contract, shall be taken and held to mean the qualified electors of the City and County, and not otherwise.

28. Prohibiting the sale, lease or other disposition of any plant owned, acquired or constructed by the City and County, or any water rights owned or acquired by said City and County, except upon a vote of the qualified electors first had and obtained.

188 29. Providing that all such plants and water right shall be under the sole control and management of said Commission.

30. Providing for the recall of any member of said Commission.

31. Providing for the filling of all vacancies in said Commission by the remaining members thereof.

32. Authorizing the creation of an indebtedness in the sum of $8,000,000.00 to provide a municipal water plant or system, and everything incidental or necessary thereto for supplying the City and County and its inhabitants with water for all uses and purposes.

33. Providing that said indebtedness be evidenced by bonds of the par value of $8,000,000.00, in convenient denominations, of not more than $1,000.00 each, and bearing four and one-half per cent. interest per annum.

34. Granting to the Commission the power to fix the date, form and time of maturity of said bonds.

35. Requiring the City Council to pass such ordinances as the Commission may deem necessary respecting the issuance of said bonds.

36. Requiring the City Council to pass such ordinances as said Commission may deem necessary respecting the full exercise of all the powers given it.

37. Requiring the City Council to pass all such ordinances in the form recommended by the Commission, without amendment.

38. Requiring the Mayor to sign all such ordinances.

39. Authorizing the Commission to issue said bonds from time to time as they are required for actual use or sale.

189 40. Requiring the Mayor to sign all such bonds as the Commission may issue.

41. Requiring the City Clerk to sign and attest, under the seal of the City, all such bonds as the Commission may issue.

42. Requiring the Auditor to register all such bonds.

43. Providing that such bonds shall not be sold at less than par, nor except after advertisement, as in the Charter provided for the sale of public improvement bonds.

44. Providing that said bonds may be called for redemption and redeemed by the Commission, in like manner as provided in Section 314 of the Charter.

45. Authorizing a binding contract between The Denver Union Water Company and the City and County of Denver for the purchase by the City of all of the property included and embraced in the appraisement hereinabove described, and fixing the terms of said contract.

46. Requiring the City Council, within sixty days after the adoption of said Section 264-A, to call a special municipal election to be held on the first Tuesday in September, 1910.

47. Requiring, in the event of the acceptance by The Denver Union Water Company of said contract of purchase, the submission at said election to the qualified taxpaying electors of the question of issuing $8,000,000.00 in bonds, of which $7,000,000.00 at par are directed to be used in completing the said purchase, and the other $1,000,000.00 are directed to be sold or used by the Com-

mission to improve, repair and add to the water plant so purchased.

190 48. Directing the form of ballot to be used in that event at such election.

49. Requiring that in the event said The Denver Union Water Company shall not accept said contract or purchase as aforesaid, then at said special election there shall be submitted to the qualified taxpaying electors the question of issuing $8,000,000.00 in bonds, to be sold or used to construct and put into operation a complete system of water works for supplying said City and County and all its inhabitants with water for all uses and purposes.

50. Providing the form of ballot to be used in that event at said election.

51. Requiring that such form, or so much thereof as the Commission may deem necessary, shall be sold or used by said Commission to construct and put into operation a complete system of water works for supplying said City and County and all its inhabitants with water for all uses and purposes.

52. Requiring said Commission forthwith to proceed to construct such complete system of water works.

53. Requiring said Commission forthwith, upon its election, to proceed to make a careful investigation of the value of the plant of The Denver Union Water Company for the uses and purposes of the City and County of Denver and its inhabitants.

54. Requiring said Commission to proceed to make a careful estimate of the cost of constructing a complete new water system for the City and County of Denver and the inhabitants thereof.

55. Authorizing said Commission to submit at said special election an alternative bond proposition for the issuance of bonds

191 in such sum as it may deem advisable for the acquistion or construction of a water plant, or any part thereof, by any of the ways within its powers mentioned in said Section 264A.

56. Requiring that said alternative bond proposition be placed on the ballot for such election, in such form as said Commission may determine.

57. Authorizing said Commission to submit any proposition concerning its powers or trusts at any municipal election in like manner.

58. Providing that if a majority of the votes cast thereon shall be in favor of any proposition submitted it shall thereby be adopted.

59. Providing that in case alternative propositions are submitted, and each receives a majority, then the one receiving the greater affirmative vote shall be *be* the one adopted.

60. Providing that such adoption shall be a sufficient authorization for the issuance of the bonds thereby provided for.

61. Providing that said bonds, when issued, shall be and constitute an indebtedness of the City and County of Denver for the purposes aforesaid.

62. Providing that any such bonds shall be issued, sold and redeemed solely as in said Section 264A provided.

63. Repealing all provisions of the Charter in conflict with said Section 264A, of which there are many.

64. Committing the City and County of Denver to the municipal ownership or operation of the water plant or system supplying water for said City and County and its inhabitants for all purposes.

65. Depriving the City and County of Denver and the
192 qualified taxpaying electors thereof of all power to grant a new franchise relating to any street, alley or public place of said City and County for water works purposes.

Defendant further avers that owing to the manner in which said questions were submitted to the people, no qualified elector in favor of one or more of the numerous matters and things in said proposed section contained, but opposed to other of said matters and things, could vote for the matters and things, or any of them, which he favored without at the same time voting for all those matters and things therein contained to which he was opposed; that there was room for and there was a fair difference of opinion among the electors of the City and County of Denver qualified to vote and voting at said election in the month of May, 1910, in reference to said various and numerous different questions and matters therein contained, but that it was impossible under the circumstances for the voters to give expression to their will in respect thereto, and the vote taken upon said proposed Section 264A does not indicate and is not a fair or any expression of the will of the voters in regard thereto; that the total registered vote of qualified electors prior to and for said election in the month of May, 1910, was in number 74,647; all qualified to vote on said amendment; that the total number of votes cast at said election was 61,667; all qualified as aforesaid; that the number of votes cast both for and against said proposed Section 264A was 23,741, and the number of votes cast in favor of its adoption was 12,342; that the manner of the submission of the question of the adoption or rejection of said proposed amendment 264A violated the Constitution and
193 laws of the State of Colorado and the Charter of the City and County of Denver, particularly Section 179 thereof, and was such as to constitute in law and in equity a fraud upon the electorate, and said proposed amendment 264A has never been legally or at all adopted, is not now in effect, and has no force or validity.

Twenty-seventh. This defendant further avers that the said Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows are not severally or collectively the duly elected or qualified members of nor do they constitute the said Public Utilities Commission of said City and County of Denver, although they are assuming to act as such; that the office for which their names were proposed for election at said election in May, A. D. 1910, had not at any time prior to nor at the date of said election been created, nor did it exist; that the said persons were not, nor was either of them, in any manner duly or at all nominated for said office, although in and by the existing Charter of the City and County of Denver, and by the provisions of the statute of the State of Colorado in such case made and provided, it was and is required that no name of a candidate for any office be placed upon the ballot to be used for any election, nor voted

upon at such election, unless said person shall be previously duly nominated either at a convention of delegates of a political party, or by a committee duly authorized by such a convention so to do, or by petition as in said statute provided, a certificate of such nomination to be filed in the case of nominations for offices to be filled by the voters of any city or town, with the Clerk of said city or town, not more than thirty nor less than fifteen days before election, if made otherwise than by convention or a committee, and not
194 later than five days after the date of such nomination, if made by convention or committee; and likewise requiring the publication and posting of the lists of nominations in the manner and for the time in said statute provided, and the affording of an opportunity for the filing and determination of objections to said nominations; and likewise requiring every person nominated for any public office to accept such nomination in writing within five days after the filing of the certificate or nomination paper containing the same; and that further, in and by said statute applicable to said election it was provided that the ballot should contain no other names of persons who were candidates for any office to be balloted for at said election except those nominated in the manner aforesaid, and that the names of the candidates for each office should be arranged under the designation of the office in alphabetical order, so that votes might be cast for or against each candidate individually, and further providing that there should be left at the end of the list of candidates for each different office as many blank spaces as there might be persons to be elected to such office, in which the elector might write the name of any person not printed on the ballot for whom he desired to vote as a candidate for such office. And this defendant avers that each and all of the various requirements hereinabove specified were wholly neglected and disregarded in the case of the supposed election of said Anderson, Van Cise and Fellows, and each of them; that neither of said persons was nominated for the office of member of the Public Utilities Commission by any of the methods in said statutes provided, nor was any certificate of nomination as to any of said persons filed as required, nor was any
195 acceptance thereof made, nor was there any published or posted notice given as required in the statute of the fact of such nomination or nominations, nor was any opportunity afforded in any manner to object to said nominations, or either thereof, nor were the names of said candidates, or either of them, printed upon the ballot in the form and manner as required in said statute, nor were the electors afforded an opportunity to vote for or against either of said candidates individually, nor were the electors in any manner afforded an opportunity to vote in favor of any other person or persons whatsoever for said office of member of the Public Utilities Commission.

Twenty-eighth. This defendant further avers that said Section 264A was and is wholly invalid and violative of Article XX of the Constitution of the State of Colorado, in this, to-wit: that in and by Section 4 of said Article it is provided that the question of granting a franchise relating to any street, alley or public place

of the said City and County shall be submitted to vote of the qualified taxpaying electors of said City and County, upon deposit with the Treasurer of the expense (to be determined by said treasurer) of such submission by the applicant for said franchise; and in and by Section 5 of said Article it is provided that when qualified electors of the City and County of Denver, in number not less than five per cent. of the next preceding gubernatorial vote in said City and County, shall petition the Council for any measure, the Council shall submit the same to a vote of the qualified electors at the next general election, not held within thirty days after such petition is filed, and whenever such petition is signed by qualified electors, in number not less than ten per cent. of the next preceding
196 gubernatorial vote in said City and County, with a request for a special election, the Council shall submit such measure at a special election to be held not less than thirty nor more than sixty days from the date of filing the petition; whereas in and by the terms of said Section 264-A said The City and County of Denver is deprived of all powers relative to supplying the City and County of Denver and its inhabitants with water for any and all uses and purposes, except as the same are enumerated in said Section 264-A; and in and by said Section 264-A the said City and County of Denver has no power in regard to such water supply except to acquire by purchase, lease or construction a municipal water works system or plant, and to operate the same, and is without power to grant any new franchise relating to any street, alley or public place to any private individual or corporation, for the purpose of furnishing such water supply, or to enter into a contract with any private individual or corporation for said purpose.

Twenty-nineth. Defendant further avers that said Section 264-A is wholly invalid, and was never properly or at all adopted, for the reason that the matters and things therein contained do not constitute a proper or any amendment to the existing Charter of the City and County of Denver, but constitute a wholly new and independent Charter or charter provision, complete in itself and relating to the matter of supplying said City and County of Denver and the inhabitants thereof with water for all uses and purposes; that under and in pursuance of said Article XX of the Constitution of the State of Colorado it is not and was not at the time of said
197 election in May, A. D. 1910, or at any time prior thereto, proper, legal or permissible to adopt or attempt to adopt or to submit for adoption as an amendment to the existing Charter, and without the calling of a Charter Convention, to consider the same, any new Charter or any additional or supplemental Charter; but that in all such cases it was and is necessary, and a condition precedent to the submission or adoption of any such new, additional or supplemental Charter, that the question of the holding of a Charter Convention to consider the same should first be submitted to the qualified electors; that thereafter said Charter Convention, elected and constituted as in said Article XX provided, should convene and as a representative, deliberative assembly consider, adopt and approve said proposed new, additional or supplemental Charter, and that only after such approval by said Charter Convention could such

new, additional or supplemental Charter be submitted to the qualifisi electors for their approval and adoption or rejection; and that all of these matters were entirely neglected in reference to the submission and supposed adoption of said Section 264-A; that no Charter Convention in reference thereto was held or attempted to be held, nor was the question of holding such a convention submitted or attempted to be submitted to the qualified electors; but that said matter alleged to constitute said Section 264A was immediately placed upon the ballot and submitted to the vote of the electors, without previous consideration, deliberation or reflection by the representatives of said electors in Charter Convention assembled, or otherwise, or at all.

198 Thirtieth. This defendant further avers that said Section 264A was and is wholly invalid and in conflict with the Constitution of the United States as well as with the Constitution of the State of Colorado, in that it impairs the obligation of prior existing contracts between said The City and County of Denver and this defendant, contrary to Section 10 of Article I of the Constitution of the United States, and Section 11 of Article II of the Constitution of the State of Colorado, in that, whereas, by said contracts then and now existing, the City and County of Denver was obligated to this defendant to purchase the water works system or plant of this defendant, and to pay therefor the value to be arrived at by appraisement as in said Ordinances No. 44 of the Series of 1890 and No. 163 of the Series of 1907 duly set forth; or, in lieu thereof, was obligated to renew the franchises and privileges evidenced by said Ordinance No. 44 of the Series of 1890 for an additional period of twenty years from and after the tenth day of April, A. D. 1910; and in and by said existing contracts was and is obligated to take water for all uses and purposes solely and exclusively from this respondent through its water works system or plant and not otherwise, and to pay therefor the rates specified for said second period of twenty years in said Ordinance No. 44 of the Series of 1890; nevertheless, in and by said Section 264A, which, if it was properly adopted, is a law, said City and County of Denver is forbidden to grant any new franchise to any private individual or corporation covering the supply of water to said City and County or its inhabitants, for any purpose, and is forbidden to obtain such supply except from a

199 plant owned or leased and operated by said City and County of Denver; and is forbidden to purchase the water works system or plant of this defendant, appraised as aforesaid at the value of $14,400,000.00, except at the price of $7,000,000.00 in bonds of the City and County of Denver, as in said Section 264A specified, or for such price as may be approved by said Public Utilities Commission, and ratified by the qualified electors; and is authorized and required to proceed immediately to the acquisition and operation of its own water works system or plant, and to supply therefrom said City and County of Denver and all of the inhabitants thereof with water for all uses and purposes; and said City and County of Denver is required, in case bonds to the amount of $8,000,000.00 are authorized therefor, to proceed at once to construct

and put into operation a complete system of water works for supplying said City and County and the inhabitants thereof with water for all uses and purposes; and is denied the right to purchase or acquire or exercise any option, right, privilege or power of purchasing or acquiring any water plant or system from any person, persons or corporation except upon a vote of the qualified electors first had and obtained, authorizing the same; and is likewise denied the right or power to purchase and acquire any water system or plant, or to extend any contract with reference thereto, except upon such vote, notwithstanding the binding obligations of said existing contracts between said City and County and this defendant, requiring said City and County either to purchase said water works system or plant of this defendant or to renew said contract and said franchises
200 and privileges for the additional period of twenty years, without regard to any such vote.

Thirty-first. This defendant further avers that said Section 264-A was and is wholly invalid and in conflict with the Constitution of the United States, in this, to-wit: that thereby this defendant is denied the equal protection of the laws, contrary to the provisions of Article XIV of the amendments to the Constitution of the United States and the corresponding provisions of the Constitution of the State of Colorado, including Section 25 of Article V thereof, for the reason that, whereas under Article XX of the Constitution of the State of Colorado and the Charter of said City and County of Denver, all persons and corporations desiring to engage in the business of supplying to said City and County of Denver and the inhabitants thereof transportation, light, heat, power, telephone and telegraph service and other matters and things commonly designated as public utilities, are privileged to and may obtain franchises for any of such purposes relating to the streets, alleys and public places of said City and County of Denver, such franchises are denied to and can not be obtained by persons or corporations such as is this defendant, engaged in or proposing or desiring to engage in the business of furnishing said City and County of Denver with water, nor can such business of furnishing water under the terms of said Section 264-A be carried on in said City and County of Denver by any private individual or corporation; and further, because in and by Article IX of the Charter of said City and County, in respect to the acquisition by purchase, condemnation, construction
201 or otherwise, by said City and County of Denver, of any public utility, work or way other than a water works system, the same can not be acquired either by purchase, condemnation, construction or otherwise, except upon the filing of a petition signed by qualified electors, in number not less than twenty-five per cent. of the next preceding vote for Mayor, describing the proposed public utility work or way, and requesting the acquisition of the same, and except after investigation and report by the Board of Public Works covering the method of such acquisition, the probable cost thereof, the preparation of specifications, plans and details for that purpose, the determination as to whether the same can be operated by the City and County at a profit or advantage, either in quality

or cost of service, and a report of the conclusions of said Board to the Mayor and Council in writing; and in case such report is favorable, the legal opinion of the City Attorney on all matters of law involved in such proposition, the concurrence or non-concurrence of the Mayor therein, the preparation by the Board of Public Works of full specifications, plans and details, with a revised estimate of the total maximum cost, the submission to the City Council of a bill for an ordinance providing for the acquisition of such public utility, and setting forth the full description thereof, the revised total maximum estimated cost, the manner in which it shall be acquired and the maximum amount of bonds to be issued, the number of installments and time when such bonds shall mature and the rate of interest thereon, the passage by both branches of the City Council and the approval by the Mayor of such ordinance, and finally the submission to the qualified taxpaying electors of the question of
202 issuing the bonds necessary for the purpose of said acquisition; all of which are valuable and important safeguards to the investment of any sum or sums of money whatsoever by private individuals or corporations in the business of supplying any such public utility to the City and County of Denver; but in and by said Section 264-A, this defendant, and all other persons and corporations engaging or proposing to engage in the business of supplying water to said City and County of Denver and the inhabitants thereof, are without any right or reason denied the protection thus afforded to all other persons and corporations whatsoever, and their property is subject to be taken or destroyed or the value thereof greatly impaired by the passing whim or caprice of the public or at the uncontrolled will of the three persons constituting or assuming to act as the Public Utilities Commission of said City and County of Denver. This defendant further avers that said Section 264-A likewise constitutes a denial to this defendant of the equal protection of the laws, as between this defendant and other persons and corporations engaged, engaging or proposing to engage in the business of supplying water to said The City and County of Denver and the inhabitants thereof, in this, to-wit, that, whereas the proposal to acquire by purchase the water works system or plant of this defendant for and at the price of $7,000,000.00 as aforesaid was originated, submitted to a vote of the people and received a majority of the votes cast thereon without in any manner whatsoever complying with any of the said requirements of Article IX of the existing Charter of said City and County of Denver as hereinabove set forth; and, whereas said Public Utilities Commission is, in respect to the said property of your orator authorized, of its own motion
203 and without previous compliance with any of said provisions of said Article IX, immediately to submit to the vote of the qualified electors the question of issuing bonds to any amount, for the purpose of effecting such purchase of this defendant's property, yet in respect to the property of all other persons and corporations engaged in the business of supplying water to said City and County of Denver or the inhabitants thereof, or any part or portion of the same (some parts or portions of which were and are supplied with

water by other persons or corporations, although this defendant supplies the major part and portion thereof), it was prior to the alleged adoption of said Section 264-A and is now required that all of said provisions and safeguards of said Article IX be first observed and fulfilled before any such proposition could or can be submitted to or approved by the qualified electors.

Thirty-second. This defendant further avers that said so-called Section 264A is invalid, in that it constitutes a deprivation of the defendant's property without due or any process of law, and a taking and damaging of the same without compensation previously or at all paid or provided for, contrary to Article XIV of the amendments to the Constitution of the United States, and contrary to Section 25 of Article II, and Section 15 of Article II of the Constitution of the State of Colorado, in this, to wit: that the contract rights of this defendant, whereby said City and County of Denver was and is obligated either to purchase the water works system and plant of this defendant for and at a price to be arrived at by appraisement as aforesaid, or, failing in that, to renew said
204 Ordinance No. 44 of the Series of 1890 for an additional period of twenty years as hereinabove set forth, were and are valuable property rights, of which this defendant has been at all of said times and is now seized and possessed; and that said Section 264A, by its terms, purports to deprive this defendant of said property rights and each thereof and to destroy the same without due or any process of law, and that the illegal, inequitable and unconscionable conduct and acts of said City and County of Denver, including the proposal and alleged adoption of said Section 264A are all in pursuance of the wrongful plan, conspiracy and system conceived by said defendant The City and County of Denver, and certain politicians, agitators and newspapers therein, for the purpose and with the intent of impairing, damaging and in large measure destroying this defendant's property as aforesaid, so that the same may be taken and acquired by said The City and County of Denver at greatly less than its true value, and without making just compensation therefor.

Thirty-third. This defendant further avers that Article XX of the Constitution of the State of Colorado, under which the present Charter of the City and County of Denver was adopted, and all acts and steps taken thereunder, including the supposed adoption of said Section 264A, were and are unconstitutional and invalid, for the reason that said Article XX of the Constitution of the State of Colorado, as well as said Section 264A, and the method of its supposed adoption, are in violation of Section 4, Article IV, of the Constitution of the United States, guaranteeing to and requiring in the State of Colorado a Republican form of government,
205 as well as in violation of Section 4 of the Act of Congress approved March 3, 1875, and entitled "An Act to enable the people of Colorado to form a constitution and state government, and for the admission of said State into the Union on an equal footing with the original States," wherein and whereby it is required that the Constitution of said State of Colorado shall be Republican

in form and not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence, and likewise in violation of Section 2, Article II, and Section 1, Article V, of the Constitution of the State of Colorado, and for the further reason that said Article XX is in violation of Section 2 of Article XIX of the Constitution of the State of Colorado, in that said Article XX was not submitted to the people of the State of Colorado, in accordance with the requirements of the Constitution of said State; that said Article XX contained and contains more than one amendment to said Constitution as it then existed, and that each separate amendment was not voted upon separately; that said Article XX was not in the nature of an amendment to the then existing Constitution, but an addition thereto, and that either as an addition or an amendment it attempted to amend and did alter and amend more than six previously existing Articles of said Constitution.

Thirty-fourth. Defendant further avers that none of the provisions and requirements of Article IX in the existing Charter of the City and County of Denver in respect to the acquisition by purchase, condemnation, construction or otherwise, by said The City and County of Denver, of any public utility, work or way,
206 as heretofore in paragraph Thirty-first of this answer set forth, has been in any manner or at all observed or fulfilled, either in respect to the acquirement by purchase, condemnation or otherwise of this defendant's water works system or plant, or any part thereof, or in respect to the acquisition of a new, independent and complete system of water works by construction, or the authorization or issuance of bonds for that purpose, or the submission to the qualified electors of the question of authorizing or issuing such bonds, as is now contemplated to be done at said special election on the first Tuesday in September, 1910; but, on the contrary, all of said provisions of Article IX of said existing Charter of the City and County of Denver, as well as other provisions of said Charter relative to the submission of the question of issuing said bonds, and the form thereof and the method of their issuance and payment, have been violated, and will be further violated by said special election proposed to be held in September as aforesaid, and by the submission thereat of the question now proposed to be submitted, and by the issuance of all or any of the bonds now proposed to be authorized thereat, and by the use of the same in any manner for the purpose contemplated.

Thirty-fifth. This defendant further avers that in reliance upon its contract relations with said The City and County of Denver as hereinabove set forth, and upon the obligation of said The City and County of Denver, either to purchase all of this defendant's water works system and plant and pay for the same at the valuation
207 to be fixed by appraisement; or, failing in that, the obligation of said The City and County of Denver to renew said Ordinance No. 44 of the Series of 1890 for an additional period of twenty years from and after April 10, 1910, this defendant has invested large sums of money, to-wit: many millions of dollars, in

the acquisition, completion and enlargement of said water works system and plant; and with the knowledge and consent and at the instance of said The City and County of Denver (which then and there well knew the claims and understanding of this defendant as to its contract rights aforesaid) and the inhabitants thereof, and for the purpose of providing adequate and sufficient service and pressure to meet the increasing needs and demands of said City and County of Denver and the inhabitants thereof, this defendant has within the past year expended a large sum of money in new construction, including the construction of a new forty-eight-inch conduit 64,440 feet in length, for the conveyance of water from its storage reservoirs to the distributing system within the City, at a cost of $350,769.74, of which $246,444.44 has been expended since April 10, 1910; and including also the laying of new and larger distributing mains in the streets, alleys and public places of certain portions of the City and County of Denver, to facilitate the distribution of water and increase the pressure thereof, for the comfort, convenience and safety of the inhabitants and including other additions and betterments, all of which has been done since said April 10, 1910, and at a cost exclusive of said conduit of $57,976.05; and that further additions to and enlargements of said water works system and plant are now and will in the near future be necessary to afford proper distribution of water and the necessary pressure to the rapidly growing city, all of which this defendant is willing and offers to undertake and do, and will do unless prevented by the wrongful, illegal, inequitable and unconscionable acts of said The City and County of Denver, the so-called Public Utilities Commission and the members thereof, and certain of the inhabitants of said The City and County of Denver, as hereinabove stated.

208

And this defendant denies all and all manner of unlawful combination and confederacy, wherewith it is by the said bill charged, without this: that there is any other matter, cause or thing in the said plaintiff's said bill of complaint contained material or necessary for this defendant to make answer unto, and not herein or hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge or belief of this defendant, all which matters and things this defendant is ready and willing to aver, maintain and prove as this Honorable Court shall direct; and humbly prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

THE DENVER UNION WATER COMPANY,
By GERALD HUGHES,
Solicitor for The Denver Union Water Company.

CLAYTON C. DORSEY,
WILLIAM V. HODGES,
A. M. STEVENSON,
Of Counsel.

209 & 210 UNITED STATES OF AMERICA,
District and State of Colorado,
City and County of Denver, ss:

D. H. Moffat, being first duly sworn, on his oath deposes and says: that he is President of the Defendant The Denver Union Water Company; that said defendant is a corporation and for that reason he makes this verification in its behalf; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to matters therein stated on information and belief, and as to those he believes it to be true.

D. H. MOFFAT.

Subscribed and sworn to before me this 25th day of August, A. D. 1910.

My Commission expires February 21, 1911.

[NOTARIAL SEAL.] FRANK J. DENISON,
Notary Public.

211 (Endorsed.)

In the Circuit Court of the United States Within and for the District of Colorado. In Equity.

No. 5572.

THE NEW YORK TRUST COMPANY, a Corporation, Complainant,
vs.
THE CITY AND COUNTY OF DENVER, a Municipal Corporation; Robert W. Speer, as Mayor of the City and County of Denver; Burt F. Davis, as Clerk of said City and County of Denver; Albion K. Vickery, as Auditor of said City and County of Denver; Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows, as Members of and Constituting the Public Utilities Commission of said City and County of Denver; Ellis Meredith, A. E. Mauff and Harry Petrie, as Members of and Constituting the Election Commission of said City and County of Denver; The Denver Union Water Company, a Corporation; and The South Platte Canal and Reservoir Company, a Corporation, Defendants.

Answer of The Denver Union Water Company.

GERALD HUGHES,
Solicitor for The Denver Union Water Company.

CLAYTON C. DORSEY,
WILLIAM V. HODGES,
A. M. STEVENSON,
Of Counsel.

Filed Aug. 25, 1910. Charles W. Bishop, Clerk.

212 Fifty-fifth Day, May Term.

THURSDAY, *August 25th, A. D.* 1910.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the third day of May, A. D. 1910.

5572. In Chancery.

THE NEW YORK TRUST COMPANY
vs.
THE CITY AND COUNTY OF DENVER et al.

Bill for Injunction and for Other Relief.

Upon motion of the defendant, The Denver Union Water Company by its solicitor;

It is ordered that leave be and hereby is granted to said defendant to forthwith file herein its cross-bill against the complainant herein and all of its co-defendants except The South Platte Canal and Reservoir Company.

213 In the Circuit Court of the United States Within and for the District of Colorado.

In Equity. No. 5572.

THE NEW YORK TRUST COMPANY, a Corporation, Complainant,
vs.
THE CITY AND COUNTY OF DENVER, a Municipal Corporation; Robert W. Speer, as Mayor of the City and County of Denver; Burt F. Davis, as Clerk of said City and County of Denver; Albion K. Vickery, as Auditor of said City and County of Denver; Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows, as Members of and Constituting the Public Utilities Commission of said City and County of Denver; Ellis Meredith, A. E. Mauff and Harry Petrie, as Members of and Constituting the Election Commission of said City and County of Denver; The Denver Union Water Company, a Corporation; and The South Platte Canal and Reservoir Company, a Corporation, Defendants.

Cross-Bill of Defendant The Denver Union Water Company.

To the Honorable the Judges of the Circuit Court of the United States for the District of Colorado:

Comes now the defendant The Denver Union Water Company, a corporation duly organized and existing under and by virtue of the laws of the State of Colorado, and a citizen of said State, and files this its cross-bill against the defendants The City and County

of Denver; Robert W. Speer, as Mayor of the City and
214 County of Denver; Burt F. Davis, as Clerk of said City and County of Denver; Albion K. Vickery, as Auditor of said City and County of Denver; Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows, claiming to be and assuming to act as Members of and constituting the Public Utilities Commission of said City and County of Denver; Ellis Meredith, A. E. Mauff and Harry Petrie, as Members of and constituting the Election Commission of said City and County of Denver, and The New York Trust Company, Complainant, and thereupon your defendant complains and says:

First. That said The Denver Union Water Company is now and ever since October 18, 1894, has been a corporation duly organized, existing and doing business under and by virtue of the laws of the State of Colorado, and having its principal office and place of business in the City and County of Denver (formerly City of Denver) in said State; that in, by and under its Articles of Incorporation, and by virtue of full compliance with the laws of the State of Colorado in such case made and provided, it is now, and ever since said date has been, authorized and empowered by the State of Colorado to acquire, construct, extend, own, maintain and operate water works for and engage in the business of supplying the City and County of Denver and included municipalities and territory, and all of the inhabitants thereof, with water for all uses and purposes, and to take tolls therefor; and to acquire, own, maintain and operate such property as may be necessary or convenient for said purposes, and in the prosecution of such business to place, maintain and oper-
ate in the roads, streets, alleys and public places of said The
215 City and County of Denver and included municipalities and territory, its pipes, mains, conduits and other apparatus constituting its plant or system for the supply of water thereto and therein.

Second. That the defendants The City and County of Denver, a municipal corporation existing under and by virtue of Article XX of the Constitution of the State of Colorado; Robert W. Speer, as Mayor of said City and County of Denver; Burt F. Davis, as Clerk of said City and County of Denver; Albion K. Vickery, as Auditor of said City and County of Denver; Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows, who claim to be and assume to act as members of and constituting the Public Utilities Commission of said City and County of Denver; Ellis Meredith, A. E. Mauff and Harry Petrie ,as members of and constituting the Election Commission of said City and County of Denver,—are each and all of them residents and citizens of the State of Colorado, and having their principal offices and places of business in the City and County of Denver, in said State, and that the complainant, The New York Trust Company, is a corporation organized and existing under and by virtue of the laws of the State of New York, and a citizen and resident of said State; that the solicitors for The New York Trust Company in this suit are Joel F. Vaile, Henry McAllister, Jr., and William N. Vaile, and that Underwood, Van Vorst and Hoyt, J.

Markham Marshall and Vaile, McAllister and Vaile are of counsel for said The New York Trust Company, and that said Henry McAllister, Jr., being one of the solicitors and of counsel for said The New York Trust Company, has his office and place of business as a counselor at law at room 420, Equitable Building, in said City and County of Denver.

216 Third. That the amount involved in this controversy exceeds, exclusive of interest and costs, the sum or value of five thousand dollars ($5,000.00).

Fourth. That the complainant herein, The New York Trust Company, on the 22d day of August, A. D. 1919, filed in this Honorable Court its bill of complaint against your defendant and the other defendants as hereinabove set forth, and in and by which said bill it alleged: the corporate existence, citizenship and residence of each, every and all of the parties to said suit, both complainant and defendants; that the present corporation The City and County of Denver embraced and was composed of several predecessor municipal corporations, and that your defendant, The Denver Union Water Company, was the successor in interest, by purchase and otherwise, of all the property, plants and business of the several Water Companies organized and engaged in supplying water in part of the territory now embraced in the City and County of Denver since the year 1870 and until the 18th day of October, 1894, and that said several predecessor municipal corporations of the City and County of Denver, being duly authorized thereunto, had, prior to the 18th day of October, 1894, granted to said several water companies which had been the predecessors of your defendant, The Denver Union Water Company, certain ordinances and contracts for the supplying of water to said several municipal corporations and to the inhabitants thereof, many of which said ordinances and contracts were still in full force and effect, and that among said ordinances and contracts there was included Ordinance No. 44 of the Series of 1890 of the Ordinances of the City of Denver,

217 which had been duly passed by the City Council of said corporation, a copy of which said ordinance is attached to said bill as "Exhibit A", to which reference is hereby made as a part of this said cross-bill, and as "Exhibit A" to this said cross-bill, and which said Ordinance No. 44 of the Series of 1890 is now and for some time past has been the property of your defendant, The Denver Union Water Company; that on the 20th day of October, A. D. 1894, your defendant, The Denver Union Water Company, did execute and deliver to Continental Trust Company of the City of New York, as trustee, its certain mortgage or deed of trust to secure a bond issue of eight million dollars ($8,000,000.00), which said mortgage or deed of trust was duly recorded in the records of the office of the Clerk and Recorder of the City and County of Denver, then the County of Arapahoe, on the 1st day of November, A. D. 1894, in Book 1023, at page 28, and that the complainant, The New York Trust Company, is the legal successor in interest of said Continental Trust Company of the City of New York, under said mortgage or deed of trust copy of which is attached to said bill of com-

plaint and identified as "Exhibit B"; that the complainant, The New York Trust Company, as trustee, as the successor in trust to said Continental Trust Company, is authorized and obligated to fully carry out and perform the terms and conditions of said mortgage or deed of trust, and that thereby there was granted and sold to the complainant, The New York Trust Company, all of the property of your defendant, The Denver Union Water Company, together with all ordinances and contracts, including said Ordinance No. 44 of the Series of 1890 of the City of Denver, together with all after-acquired property of your defendant; that since the
218 execution and delivery of said mortgage or deed of trust, and under the terms thereof, your defendant, The Denver Union Water Company, has been in possession of said property and been engaged in supplying the City and County of Denver and its inhabitants and its predecessor municipalities with water, and that the property and plant owned by it constitute the sole means and source of supply of water for said municipalities and their inhabitants; that since said October 20, 1894, the territory now embraced in the City and County of Denver has doubled in population, being now more than two hundred thousand (200,000); and that to meet said rapid growth large sums of money have been expended in the enlargement of said property and plant necessary to meet the increased demands for a water supply; that the City and County of Denver is peculiarly situated in an arid or semi-arid region, depending entirely for its water supply upon the mountain streams closely adjacent thereto, and that said water, under said conditions, had a commodity value which was increasing from year to year, and that large storage reservoirs on the head-waters of said mountain streams were a necessity for the supplying of water to the City and County of Denver and its inhabitants, and to any further growth of said City; that for the purpose of meeting the necessities of enlargement of its property and plant there had been organized The South Platte Canal and Reservoir Company, all of the stock of which was owned and held by your defendant, The Denver Union Water Company, and whose property was subject to a certain mortgage or deed of trust to secure a bond issue of four million dollars ($4,000,000.00), all of which said issue had been sold and
219 issued and was in good faith outstanding, and that your defendant was further the lessee of The South Platte Canal and Reservoir Company, for the term of twenty (20) years from and after July 1, 1903, of all of its property of every kind and description, and was using the same in supplying the City and County of Denver and its inhabitants with water; that the City and County of Denver, as the legal successor of the City of Denver, under Article XX of the Constitution of the State of Colorado, succeeded to the rights and assumed the liabilities of said City of Denver, including those conferred by Ordinance No. 44 of the Series of 1890; that the bond issues of your defendant, The Denver Union Water Company, and The South Platte Canal and Reservoir Company were issued and sold upon the assumption of the validity of Ordinance No. 44 of the Series of 1890, and that the contractual relations of the

parties thereto would be duly kept and performed; that the only method for the termination of Ordinance No. 44 of the Series of 1890, Exhibit A in said bill, was through Sections 11, 12 and 20 of said ordinance, and that your defendant, The Denver Union Water Company, had in every respect and at all times fully complied with all the terms and provisions of said ordinance; that all of the property and plant belonging to your defendant, The Denver Union Water Company, and controlled and used by it in supplying the City and County of Denver and its inhabitants with water, constitutes a unit, and that each of the several parts are essential and inseparable; that Ordinance No. 163 of the Series of 1907 of the City and County of Denver, approved October 2, 1907, and attached to said bill as "Exhibit C" (a copy of which is hereunto attached as Exhibit B to this cross-bill) was passed for the purpose of
220 taking advantage of Section 11 of Ordinance No. 44 of the Series of 1890, and that pursuant thereto a contract between your defendant and the City and County of Denver was duly executed, but that defendant The City and County of Denver claimed that said Ordinance No. 163 of the Series of 1907, and the action taken thereunder, was not binding upon said City and County of Denver as an election to purchase said property under the provisions of Ordinance No. 44 of the series of 1890, and that said claim and contention on the part of the City and County of Denver were without merit and were in violation of the Constitutional rights, both State and Federal, of the complainant, The New York Trust Company, but that in truth Ordinance No. 163 of the Series of 1907, and the action thereunder, did constitute an election to purchase the property, plant and system of your defendant at the appraised price under said Ordinance No. 44 of the Series of 1890, and Ordinance No. 163 of the Series of 1907; that an appraisement of the property of your defendant, The Denver Union Water Company, as described in said Ordinance No. 163 of the Series of 1907, was duly had, pursuant to the provisions of said ordinance, and Ordinance No. 44 of the Series of 1890, and that an award was made by said appraisers, after a thorough examination and appraisement of said property, on the 20th day of March, 1909, fixing the value of said appraised property at fourteen million four hundred thousand dollars ($14,400,000.00), subject to certain adjustments; that the names of the appraisers were John R. Freeman, of Providence, Rhode Island, C. L. Harrison, of New York City, Frederic P. Stearns, of Boston, Massachusetts, M. L. Holman, of St. Louis, Missouri, and
221 Allen Hazen, of New York City, which said appraisers were selected with great care, and were each and every one of them men of the highest reputation and national eminence in their callings as hydraulic and civil engineers, and of unquestioned integrity, experience, ability and training in reference to all matters relating to water works and the supplying of water to large municipalities; that since the said appraisement and the award of said appraisers the City and County of Denver had not, up to the time of the adoption of Section 264A of the Charter of the City and County of Denver, made any other or further investigation whatsoever of

the property and plant of The Denver Union Water Company, as described in Ordinance No. 163 of the Series of 1907, or attempted in any manner to ascertain the value thereof, and since said time only a perfunctory and pretended examination, and that since the date of the award of said appraisers, a large sum of money, to wit, six hundred ninety-four thousand three hundred forty-three dollars and ninety-five cents had been expended by your defendant, The Denver Union Water Company, for additions, enlargements and betterments to its said property and plant and as being necessary for the supplying of the City and County of Denver and its inhabitants with water; that the City and County of Denver and the Public Utilities Commission has refused to submit to the qualified electors the question of purchase; that, regardless of said appraisement and award, and without further examination of the property and plant or the value thereof, of your defendant, The Denver Union Water Company, the said the City and County of Denver proceeded
222 to adopt Section 264A of the charter of the City and County of Denver (which was Exhibit D to said bill, and a copy of which is hereunto attached as Exhibit C to this cross bill) in and by which said charter amendment seven million dollars ($7,000,000) was offered to The Denver Union Water Company for the property so appraised at fourteen million four hundred thousand dollars ($14,400,000.00), and that said offer of seven million dollars ($7,000,000.00) was not made in good faith or with any expectation that the same would be accepted, but as the result of a plan and conspiracy on the part of the City and County of Denver and certain inhabitants, agitators and newspapers in said City and County of Denver to destroy and diminish the value of said property, in order that the same might be acquired for less than its appraised and actual cash value, and that the further provisions of said Section 264A are likewise a part of the plan and conspiracy on behalf of the City and County of Denver and others; that it is impossible for the City and County of Denver to construct an independent municipal plant for the sum of eight million dollars ($8,000,000.00), or any sum less than two or three million dollars in excess of the appraised value of defendant company's plant as aforesaid, which will adequately supply said City and County of Denver and its inhabitants with water as the same is required; that the City and County of Denver has not, as contemplated in said Ordinance No. 163 of the Series of 1907, offered or made any new contract, or given any such franchise to The Denver Union Water Company, but that by its actions and transactions it has elected to purchase from your defendant, The Denver Union Water Company, all of its prop-
223 erty under the terms of Ordinance No. 44 of the Series of 1890, but that said City and County of Denver is wholly disregarding such obligation and agreement, and is proceeding with the object and intention of destroying said property and its value, to the detriment and loss of the complainant, The New York Trust Company, as trustee, and the bondholders under said mortgage and deed of trust; that it is claimed on behalf of the City and County of Denver that your defendant, The Denver Union Water Company,

is doing business within said City and County of Denver and furnishing water to it and its inhabitants without legal right or authority so to do, but at the suffrance or will of said municipality; that on the 17th day of May, A. D. 1910, a majority of the qualified electors voting thereon, adopted an amendment to the Charter of the City and County of Denver, designated as Section 264A, which is attached to said bill as "Exhibit D," and which is herein referred to under said name and attached hereto as "Exhibit C" and made a part of this said cross-bill; that under said Section 264A there purported to be created a Public Utilities Commission, consisting of three members, named as defendants in said bill, to wit: Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows, who have qualified and are acting under said Section 264A, and attempting to exercise the powers therein conferred, but that your defendant, The Denver Union Water Company, had failed and refused to comply with the terms and provisions of said Section 264A, and to make and deliver the deed as therein required, and that the complainant would not have joined in such action, nor could it have done so, without violating the obligations im-
224 posed upon it under its mortgage or deed of trust, Exhibit B; that said Public Utilities Commission, claiming to act under Section 264A of said Charter, had caused to be introduced a certain ordinance, designated as Ordinance No. 98 of the Series of 1910, in the Council of the City and County of Denver, and the same was passed and enacted by said Council on July 6, 1910, calling a certain election for the first Tuesday in September, 1910, and providing for the submission of certain questions at said election, including the question of the issuance of eight million dollars of bonds, as provided in Section 264A, for the purpose of constructing a municipal water plant (a copy of said ordinance was attached to said bill as Exhibit E thereto, and such a copy is hereunto attached as Exhibit D to this cross-bill); that under the provisions of Section 264A, and Ordinance No. 98 of the Series of 1910, the proceeds of said eight million dollar bond issue can be used only for the construction of a complete, separate municipal system of water works, and that no part thereof can be devoted to the purchase of the existing plant or water works of your defendant, The Denver Union Water Company, or to the payment of the appraised price of fourteen million four hundred thousand dollars, and that if said eight million dollar bond issue is so authorized, the said City and County of Denver is committed absolutely to the expenditure of said sum of money for an independent, separate plant; that said City and County of Denver is authorized only to contract for a supply of water for itself and its inhabitants, by arrangement with private individuals or corporations, or to construct, purchase or ac-
225 quire a municipal water works, but that said City and County of Denver is not authorized, under the Constitution of the State of Colorado, or its Charter, to construct or acquire two (2) complete water works systems, or to purchase one and construct another, both adequate in themselves for the supplying of water to the City and County of Denver and its inhabitants, and that as

prior to the adoption of Section 264A it had elected to purchase the property and plant of The Denver Union Water Company, it had no power or authority to construct an independent plant, nor to hold an election for that purpose; that said Section 264A of the Charter is in certain particulars in conflict with the Constitution of the United States and of the State of Colorado, as an impairment of an existing contract, and as an attempted deprivation, without due process of law, of the property of The New York Trust Company, complainant; that Section 264A of the Charter is in itself an election and reiteration of an election on the part of the City and County of Denver to acquire the plant and property of your defendant, The Denver Union Water Company, and that the terms of Ordinance No. 44 of the Series of 1890 provide that in case of a disagreement between the parties to said contract, after there shall have been such election, that the value of the property shall be determined in a certain manner therein fixed and determined, and that the parties thereto, The Denver Union Water Company, your defendant, and the City and County of Denver, are both bound to accept the result of said appraisement; that regardless of said action so taken by Section 264A of the Charter, the City
226 and County of Denver was proceeding to violate its obligations under Ordinance No. 44 of the Series of 1890, and in violation of the provisions of the Constitutions of the United States and of the State of Colorado, with the purpose and intent of forcing your defendant, The Denver Union Water Company, to part with its property at much less than the appraised value, and had committed to the Public Utilities Commission, under Section 264A of the Charter, all powers in connection with the acquirement of said property and plant; that under the terms and provisions of the mortgage or deed of trust to The New York Trust Company, as trustee, the purchase price of said property and plant to be received by The Denver Union Water Company was assigned to The New York Trust Company, as trustee, under the terms of said mortgage or deed of trust and for the purposes as therein stated; that your defendant, The Denver Union Water Company, had failed and refused to sell said property at the offered price of seven million dollars, as set forth in Section 264A of the Charter, and was claiming, through its officers and directors, that the valuation of fourteen million four hundred thousand dollars, fixed by said appraisers, was inadequate and insufficient, and that said property was worth a sum largely in excess of fourteen million four hundred thousand dollars, and that the City and County of Denver by reason of its failure and refusal to consummate the purchase of said property at said appraised value and its repeated declarations that it did not intend so to do, obligated itself to renew Ordinance No. 44 of the Series of 1890 for the term of twenty years from April 10,
227 1910, in accordance with the terms and provisions of said ordinance, and that for these reasons your defendant had determined it to be for its best interests to insist upon said obligation of the City and County of Denver to renew said ordinance, and not by suit or proceeding against the City and County of Den-

ver to insist upon the consummation of said purchase under said election and appraisement and the payment of the purchase price thereunder, and for such reason had refused to institute legal proceedings to compel the City and County of Denver to consummate said purchase; that the complainant, The New York Trust Company, will be irreparably injured, unless your defendant, The Denver Union Water Company, and the City and County of Denver be compelled to abide by the terms and provisions of the Ordinance No. 44 of the Series of 1890, and to consummate the sale of said property, and that the construction of an independent water plant by the City and County of Denver would greatly impair the value of the security held by The New York Trust Company for the benefit of the bondholders of your defendant, The Denver Union Water Company, and that the City and County of Denver and its inhabitants and taxpayers would be greatly damaged by being compelled to acquire two (2) separate and complete water plants; that The New York Trust Company was without plain, speedy or adequate remedy at law; that it is willing and offers, so far as its interest is concerned, to complete the sale of said property in accordance with the terms and provisions of Ordinance No. 44 of the Series of 1890 and the appraisement held thereunder; that the
228 Mayor of the City and County of Denver is its Chief Executive officer, and together with the defendants Burt F. Davis and Albion K. Vickery is charged with certain duties under Section 264A, and that the election proposed to be held upon said bond issue is under the supervision of the Election Commission; that certain adjustments in the appraised value of fourteen million four hundred thousand dollars are required, by virtue of the changes since said appraisement; wherefore, The New York Trust Company prayed for a writ of subpœna to the defendants, requiring them to appear and answer to said bill; for a writ of injunction against the defendants, except your defendant, The Denver Union Water Company, and The South Platte Canal and Reservoir Company, restraining them from holding or attempting to hold said election on said first Tuesday in September, 1910, for the purpose of submitting the question of the issuance of said eight million dollars of bonds, and from issuing or attempting to issue said bonds, or any thereof, for the purposes as set forth in Section 264A; that a decree be entered declaring those portions of Section 264A of the Charter, relating to the construction of a municipal water plant and the issuance of bonds therefor, void and of no effect, and declaring the true force and effect of the existing contractual relations between the defendant The City and County of Denver on the one part, and this defendant and said complainant and said bondholders on the other part, decreeing and requiring the City and County of Denver to complete the purchase of said water works system or plant for and at the appraised value thereof, prohibiting the City and County of Denver from meanwhile constructing or at-
229 tempting to construct a new or independent plant; decreeing complainant's interest in said property and providing for and requiring the payment and distribution of the purchase

price for the same; or in the alternative, should it be determined that the City and County of Denver has elected to purchase, but that the purchase price has not been fixed, then that this Court may, by appropriate proceeding, provide for the ascertainment and fixing of the amount of said purchase price and enforce the payment and distribution thereof; and praying further for other, further and different relief as the nature of the case, equity and good conscience may require, and for costs.

Fifth. That the defendant The City and County of Denver is a municipal corporation located in the State of Colorado and existing under and by virtue of Article XX of the Constitution of the State of Colorado; that Robert W. Speer is the duly elected, qualified and acting Mayor of said City and County of Denver; that Burt F. Davis is the duly elected, qualified and acting Clerk of said City and County of Denver; that Albion K. Vickery is the duly elected, qualified and acting Auditor of said City and County of Denver; that Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows, claim to be and are acting as the elected and qualified members of the Public Utilities Commission of said City and County of Denver; that Ellis Meredith, A. E. Mauff and Henry Petrie are the duly elected, qualified and acting members of the Election Commission of said City and County of Denver.

Sixth. That this is a suit of a civil nature in equity,
230 arising under the Constitution and laws of the United States, to-wit, those provisions of the Constitution of the United States and amendments thereto hereinafter specifically mentioned and referred to.

Seventh. That your defendant, The Denver Union Water Company, on October 18, 1894, was, and ever since said time has been, the successor in interest of and the owner and possessor of all of the property theretofore belonging to The Citizens Water Company, The Beaver Brook Water Company, The Mountain Water Company, The American Water Works Company of New Jersey, The Denver City Water Works Company, The Domestic Water Company, The Denver Water Company, The Denver City Irrigation and Water Company, and The Denver City Water Company, and that said property so owned by your defendant, The Denver Union Water Company, now constitutes, and at the time of its acquirement did and ever since has constituted, all of the property used in supplying the City and County of Denver and its predecessor municipal corporations and the inhabitants thereof with water, except as hereinafter stated; that included in said property so acquired as aforesaid and now owned and possessed by your defendant, The Denver Union Water Company, there is Ordinance No. 44 of the Series of 1890, of the City of Denver, which said ordinance, designated "Exhibit A", is hereto attached and by reference made a part of this cross-bill; that said Ordinance No. 44 of the Series of 1890, ever since its passage on the 10th day of April, A. D. 1890, has been and now is in full force and effect, and is the mutually binding and obligatory contract between the parties thereto and their successors in interest.

as herein alleged; that this defendant invested a very large
231 sum of money, to-wit, many millions of dollars, in the purchase and acquirement of said water works system or plant and other property appurtenant thereto and connected therewith, including said Ordinance No. 44 of the Series of 1890, and since the original purchase and acquisition thereof this defendant has invested further and additional large sums of money, aggregating not less than five million dollars ($5,000,000.00), in additions to and betterments of said water works system or plant, all of which said investments were made upon the faith and with the belief and understanding that the contract evidenced by said Ordinance No. 44 of the Series of 1890 would be fully performed and fulfilled by said City of Denver and its successor, said The City and County of Denver, in accordance with its true meaning and intent as hereinafter more fully explained, and as then and there understood, agreed to and acted upon by both parties thereto; that said Ordinance No. 44 of the Series of 1890 has ever since its original enactment been, and now is, the valid, subsisting and mutually binding and obligatory contract between this defendant and its said predecessor, The Denver Water Company, and said defendant The City and County of Denver and its said predecessor, said The City of Denver, in respect to the furnishing of a supply of water for all purposes by this defendant and its said predecessor to said The City and County of Denver and its said predecessor and the inhabitants thereof, except as the same may have been modified by the certain Ordinance No. 163 of the Series of 1907, hereinafter mentioned, and that this defendant and its said predecessor have at all times and in all particulars fully complied, and this defendant is now complying therewith.

232 This defendant further avers that while the franchise and privilege conferred and conveyed by said ordinance was limited to the period of twenty years, in that it was subject to be terminated at the expiration of said period in case said City or its successors should then purchase and pay for the water works system or plant of The Denver Water Company, its successors or assigns, at a price to be agreed upon or fixed by arbitration or appraisement, as in said ordinance contemplated, yet, by said ordinance and contract it was agreed that in case of the failure of said City or its successor to purchase and pay for said water works system or plant, as in said ordinance provided, then, in that event, it should be renewed for a period of twenty years, and the contract for the supplying of water to the said City should likewise be renewed for a like period, with a modification as to hydrant rental therein specified. And this defendant further avers that said ordinance contained no other limitation of the period of time during which it should continue to be in full force and effect and operative, nor any other provisions whatsoever as to its termination in any manner, or at all, except as hereinabove set forth; that the City and County of Denver is the legal successor of the City of Denver, a municipal corporation, and the Towns of Barnum, Colfax, Harman, Highlands, South Denver, Argo, Berkeley, Elyria, Globeville, Montclair and Valverde, and embraces within its exterior boundaries all of the territory heretofore embraced in

each and all of said predecessor municipalities; that as the successor of the City of Denver, it succeeded to all the rights and liabilities and acquired all of the benefits of said City of Denver, in-
233 cluding those created by Ordinance No. 44 of the Series of 1890.

Eighth. This defendant further avers that thereafter and prior to the expiration of said period of twenty years from and after the original passage and approval of said Ordinance No. 44 of the Series of 1890, and shortly prior to the 2nd day of October, 1907, said The City and County of Denver, as the successor under said ordinance and contract to said The City of Denver, sought from this defendant the privilege of exercising its right to purchase said water works system or plant prior to the expiration of said period of twenty years, as contemplated in the original Ordinance No. 44 of the Series of 1890, and likewise of causing and procuring the appraisement of the property constituting said water works system or plant and contemplated to be purchased under said Ordinance No. 44 of the Series of 1890, prior to the expiration of said twenty year period, and for that purpose and with that end in view said The City and County of Denver caused to be enacted by its City Council and approved by its Mayor said Ordinance No. 163 of the Series of 1907, a copy of which is hereto attached, identified as "Exhibit B", and made a part of this cross-bill; that thereafter the said contract between this defendant and said The City and County of Denver, contemplated by and set forth in said Ordinance No. 163 of the Series of 1907, was duly executed by and on behalf of said The City and County of Denver as therein authorized, and was likewise, at the instance and request of said The City and County of Denver, duly executed by and on behalf of this defendant; that in and by said ordinance and said contract it was contemplated, agreed and provided that the pur-
234 chase by the City of said water works system or plant, as contemplated in said original Ordinance No. 44 of the Series of 1890, and the appraisement of said property for that purpose, might be made, had and done prior to the expiration of said twenty year period mentioned in said Ordinance No. 44 of the Series of 1890, instead of at the expiration of said period as specified in said original ordinance.

Ninth. This defendant further avers that the said appraisement contemplated in said Ordinance No. 44 of the Series of 1890, and in said Ordinance No. 163 of the Series of 1907, and the contract made and entered into pursuant to said last mentioned ordinance, was duly had and completed as in said bill of complaint alleged, resulting in a finding that said water works system or plant was of the value of $14,400,000.00, as in said bill of complaint stated; that said finding, award and valuation was arrived at and announced on, to-wit, March 20, 1909, more than one year prior to the expiration of said twenty year period mentioned in said Ordinance No. 44 of the Series of 1890; but that said The City and County of Denver did not at any time prior to the expiration of said period of twenty years complete said purchase of or payment for said water works system or plant at said appraised value, nor take any steps whatsoever so to do, nor has

it so done at any time since date up to the present; but, on the contrary, said City and County has not only unofficially expressed its intention not to proceed further to complete said purchase, but officially, by virtue of an alleged amendment to the Charter of the City and County of Denver, to-wit, said Section 264A, has de-
235 clared its intention of not proceeding further with said purchase under said appraisement, but to erect an independent, complete and competing water works system for the supplying of water to the City and County of Denver and its inhabitants; and having so as aforesaid refused, failed and declined to complete said purchase as in Section 11 of said Ordinance No. 44 of the Series of 1890 provided, and, on the contrary, having expressly declared its intention not to so purchase, and to utterly disregard all of said acts, this defendant, The Denver Union Water Company, is entitled to a renewal of the terms of Ordinance No. 44 of the Series of 1890 for a further term of twenty years as therein provided; and said The City and County of Denver is obligated to grant such renewal, but that said The City and County of Denver refuses to acknowledge such right on behalf of this defendant, or such obligation on the part of the City and County of Denver; but, on the contrary, claims that this defendant is at the suffrance and will of said City and County of Denver, and not otherwise, engaged in business within its confines, and in supplying water to it and its inhabitants. This defendant further avers that in its judgment and that of its officers and directors, said appraised valuation of $14,400,000.00 is less than the fair, reasonable and actual value of the property appraised at the instance of and to be purchased by the City and County of Denver; that the reasonable, fair and actual value of said property does and did largely exceed said appraised value, and that if the officers and directors of this defendant should fail to insist on said right of renewal which has accrued, instead of upon the completion of said purchase, this defendant and its officers and directors would
236 violate the trust reposed in them by the stockholders of said Company, and said stockholders and each of them would suffer great hardship and financial loss; but this defendant avers that it and its predecessors have in the past fully and in all things complied with all of the provisions and stipulations of each and every contract, agreement and understanding with said The City and County of Denver and its predecessors, and is now so complying and will continue in the future so to comply, as it understands the true meaning and effect of said contracts to be, and will and hereby offers to fully perform all of the obligations of said contracts, and each thereof, upon it resting, and as the same may be in this cause finally found and decreed to exist.

Tenth. But defendant avers that notwithstanding the fact that said The City and County of Denver is bound and obligated, both in law and in equity, to renew and recognize and effectuate the renewal of said Ordinance No. 44 of the Series of 1890 as aforesaid, and notwithstanding the fact that such has been the construction and understanding of both parties to the contract from the beginning, and that on the faith of said construction and understanding

this defendant, with the knowledge of said The City and County of Denver and its predecessor, has invested large sums of money in the acquisition and enlargement of its water works system or plant, said The City and County of Denver, wholly disregarding its obligations and agreements in that particular, and with the object and intent, as your defendant believes and so charges, of depreciating and destroying the value of your defendant's property, so that the same may be obtained by said City at much less than the appraised
237 or the actual value thereof, and of forcing your defendant to part with its said property at a great and ruinous sacrifice, has, not only hitherto, since the completion of the appraisement as aforesaid, failed and refused to complete said purchase or pay for said property at the appraised value thereof, but has also failed and refused, and still fails and refuses, to renew or to recognize the right to a renewal of said contract, but, on the contrary, it has entered upon, and ever since has persisted in, and is now pursuing a wholly unconscionable and inequitable course of conduct, intended to destroy and depreciate the value of said property and to deprive your defendant of said property without due process of law, and to so harass, damage and impede your defendant with respect to the rights it enjoys under the said Ordinance No. 44 of the series of 1890 as to eventually either force your defendant to part with said water works system and property and release the said The City and County of Denver and the inhabitants thereof from the obligations imposed by said existing contract at a much less price than the appraised or the actual value thereof and so ruinously inadequate and insufficient as not to cover the amount of the outstanding bonded debt secured thereby, or, by the construction of an independent competing municipal system of water works, to utterly destroy the value of your defendant's property as a water works system or plant or as an income-producing property, to the great financial loss and detriment of your defendant and its stockholders; that, in pursuance of said plan and purpose, said The City and County of Denver and the inhabitants thereof and the users and consumers of water from said plant or system of this defendant, and certain political agita-
238 tors and newspapers in said City and County of Denver have been and are claiming and pretending that each and every right, contract and privilege heretofore owned, enjoyed or exercised by this defendant, and resting upon any ordinance, franchise, contract or agreement, binding upon said The City and County of Denver and the inhabitants thereof or any of the consumers or users of water therein, ceased, terminated and came to an end on the tenth day of April, A. D. 1910; that they and each of them further have been and are claiming and pretending that said The Denver Union Water Company is doing business within said City and County of Denver as a water company and furnishing water to said municipal corporation and the inhabitants thereof, and occupying the streets, alleys, avenues and other public places of said city, solely at the will of said municipality and the inhabitants thereof; and they and each of them have been and are further claiming and pretending and asserting that there is no existing contract with, or obligation upon said The City and County of Denver, either to purchase the

said water works system or plant of said The Denver Union Water Company at the appraised value, or at any other price, or at all, or to renew said Ordinance No. 44 or any other contract, agreement or obligation of any nature whatsoever: all of which claims and pretenses are without foundation in law or in equity, are unconscionable and extremely prejudicial, and are made and devised and reiterated and insisted upon with the sole purpose and intent of depreciating the value of said property, and the same have already greatly depreciated said value, and if persisted in will further very greatly impair and depreciate, if not wholly destroy, the
239 value of your defendant's said property and the interest of each of its stockholders therein.

Eleventh. That in pursuance of said plan and purpose, among other things, there was submitted at the general city election held in the month of May, 1910, and it is claimed that there was adopted at said election by a majority of the qualified electors voting thereon, a so-called amendment to the Charter of said The City and County of Denver, designated as "Section 264A," a true copy of which is marked "Exhibit C" to this cross-bill, hereto attached, hereby referred to and made a part hereof; that said Section 264A is not now and never was a part or portion of the Charter of the City and County of Denver, nor was it at said election in the month of May, 1910, or at any other time, properly or at all adopted as such, nor was it at said election properly or at all submitted to the votes of the qualified electors of said City and County of Denver, nor was it at said election or at any time properly or at all voted, authorized or adopted by a majority of the electors qualified to vote thereon, for the reason, among others, that said so-called Section 264A was by the ordinance purporting to authorize its submission, by the notice of the election thereon and by the form in which it was printed upon the ballot and required to be voted upon by the qualified electors, submitted to such vote as an entirety, with no option, privilege or opportunity to the voter to express his will thereon except by a vote in favor of its adoption, including all of the various and sundry matters and things therein contained, expressly or by implication, or by a vote against its adoption, which necessarily would include a vote against each and every of the several distinct propositions and things therein contained and set forth,
240 either expressly or by implication; that said Section 264A submitted in the manner aforesaid contained numerous, different, independent and unrelated matters not germane one to the other, nor in pari materia; that among the many different and independent matters, things and questions contained in and submitted by the proposal of said so-called amendment to the Charter were the following, to wit:

1. The repeal of all other charter provisions relative to the acquisition or operatiton of a water works or supplying the City and County of Denver and its inhabitants with water for any and all uses and purposes;

2. The creation of a Public Utilities Commission, to consist of three members;

3. The placing in said Commission of the complete charge and control of the acquisition or operation of a water works, or supplying the City and County of Denver and its inhabitants with water for any and all uses and purposes;

4. The granting to said Commission of all the powers given to the Board of Public Works in Chapter IX of said Charter, as to all public utilities;

5. Fixing the term of service of the members of said Commission;

6. Fixing the salary of the members of said Commission, and its method of payment;

7. Requiring the City Treasurer to pay said salary out of the general fund, upon warrant of the Commission;

8. The election of Armour C. Anderson as a member of said Commission, without previous nomination in any manner, and
241 to an office which did not exist at the time his name was placed upon the ballot;

9. The election of Edwin Van Cise as a member of said Commission, without previous nomination in any manner, and to an office which did not exist at the time his name was placed upon the ballot;

10. The election of A. Lincoln Fellows as a member of said Commission, without previous nomination in any manner, and to an office which did not exist at the time his name was placed upon the ballot;

11. The fixing of the terms of said first Commissioners named;

12. Providing a new form of ballot for future elections of Commissioners;

13. Requiring each Commissioner to give bond and fixing the amount;

14. Authorizing the Commission to employ a Secretary and such legal and technical help as it may deem necessary;

15. Authorizing the Commission to hire all other employés subject to the civil service provisions in the Charter;

16. Authorizing the Commission to fix and pay all salaries and wages of such employés.

17. Authorizing the Commission to fix and collect all rates and charges for any service under its control;

18. Authorizing the Commission to adopt reasonable rules and regulations with reference to such service;

19. Authorizing the Commission to receive and pay out moneys without previous auditing or supervision by the Auditor or
242 any other officer or authority of the City and County of Denver contrary to all other provisions of the Charter;

20. Requiring the City Treasurer to pay out moneys received by him from said Commission, upon warrant of said Commission;

21. Granting to said Commission all the powers of the City and County granted in the Constitution or named in the Charter in the matter of construction, purchasing and condemning, and purchasing, acquiring, leasing, adding to, maintaining, conducting and operating a water plant or system for all uses and purposes, and everything pertaining or deemed necessary or incidental thereto;

22. Authorizing the Commission to institute and defend all litigation affecting its duties and powers, or in relation to its trusts, without consulting the City Attorney, and without availing itself of his services;

23. Requiring the City Treasurer to pay all expenses of such litigation out of the general fund, upon the warrant of the Commission;

24. Authorizing the Commission to call to its assistance the City Attorney or any other department of the City government;

25. Denying to the City and County of Denver the right ever to purchase or acquire or exercise any option, right, privilege or power of purchasing or acquiring any water plant or system from any person, persons or corporation, except upon a vote of the qualified electors first had and obtained authorizing the same;

26. Amending all previous ordinances or contracts of the former City of Denver, by which said City was given the right or the present City and County of Denver now has the privilege or power
243 to purchase or acquire any water system or plant, by providing that the term "City," used in any such ordinances or contract, shall be taken and held to mean the qualified electors of the City and County, and not otherwise;

27. Amending all ordinances or contracts of the former City of Denver, whereby said City was given the right or the City and County of Denver now has the privilege or power to extend any contract with reference to any such water system or plant, by providing that the term "City," used in any such ordinance or contract, shall be taken and held to mean the qualified electors of the City and County, and not otherwise;

28. Prohibiting the sale, lease or other disposition of any plant owned, acquired or constructed by the City and County, or any water rights owned or acquired by said City and County, except upon a vote of the qualified electors first had and obtained;

29. Providing that all such plants and water rights shall be under the sole control and management of said Commission;

30. Providing for the recall of any member of said Commission;

31. Providing for the filling of all vacancies in said Commission by the remaining members thereof;

32. Authorizing the creation of an indebtedness in the sum of $8,000,000.00 to provide a municipal water plant or system, and everything incidental or necessary thereto for supplying the City and County of Denver and its inhabitants with water for all uses and purposes;

33. Providing that said indebtedness be evidenced by bonds of the par value of $8,000,000.00, in convenient denominations,
244 of not more than $1,000.00 each, and bearing four and one-half per cent. interest per annum;

34. Granting to the Commission the power to fix the date, form and time of maturity of said bonds;

35. Requiring the City Council to pass such ordinances as the Commission may deem necessary respecting the issuance of said bonds;

36. Requiring the City Council to pass such ordinances as said Commission may deem necessary respecting the full exercise of all the powers given it;

37. Requiring the City Council to pass all such ordinances in the form recommended by the Commission, without amendment;

38. Requiring the Mayor to sign all such ordinances;

39. Authorizing the Commission to issue said bonds from time to time as they are required for actual use or sale;

40. Requiring the Mayor to sign all such bonds as the Commission may issue;

41. Requiring the City Clerk to sign and attest, under the seal of the City, all such bonds as the Commission may issue;

42. Requiring the Auditor to register all such bonds;

43. Providing that such bonds shall not be sold at less than par, nor except after advertisement, as in the Charter provided for the sale of public improvement bonds;

44. Providing that said bonds may be called for redemption and redeemed by the Commission, in like manner as provided in Section 314 of the Charter;

45. Authorizing a binding contract between The Denver Union Water Company and the City and County of Denver for the
245 purchase by the City of all of the property included and embraced in the appraisement hereinabove described, and fixing the terms of said contract;

46. Requiring the City Council, within sixty days after the adoption of said Section 264A, to call a special municipal election to be held on the first Tuesday in September, 1910;

47. Requiring, in the event of the acceptance by The Denver Union Water Company of said contract of purchase, the submission at said election to the qualified taxpaying electors of the question of issuing $8,000,000.00 in bonds, of which $7,000,000.00 at par are directed to be used in completing the said purchase, and the other $1,000,000.00 are directed to be sold or used by the Commission to improve, repair and add to the water plant so purchased;

48. Directing the form of ballot to be used in that event at such election;

49. Requiring that in the event said The Denver Union Water Company shall not accept said contract of purchase as aforesaid, then at said special election there shall be submitted to the qualified taxpaying electors the question of issuing $8,000,000.00 in bonds, to be sold or used to construct and put into operation a complete system of water works for supplying said City and County and the inhabitants thereof with water for all uses and purposes;

50. Providing the form of ballot to be used in that event at said election;

51. Requiring that such bonds, or so much thereof as the Commission may deem necessary, shall be sold or used by said
246 Commission to construct and put into operation a complete system of water works for supplying said City and County and all its inhabitants with water for all uses and purposes;

52. Requiring said Commission forthwith to proceed to construct such complete system of water works;

53. Requiring said Commission forthwith, upon its election, to proceed to make a careful investigation of the value of the plant of The Denver Union Water Company for the uses and purposes of the City and County of Denver and its inhabitants;

54. Requiring said Commission to proceed to make a careful estimate of the cost of constructing a complete new water system for the City and County of Denver and the inhabitants thereof;

55. Authorizing said Commission to submit at said special election an alternative bond proposition for the issuance of bonds in such sum as it may deem advisable for the acquisition or construction of a water plant, or any part thereof, by any of the ways within its power mentioned in said Section 264A;

56. Requiring that said alternative bond proposition be placed on the ballot for such election, in such form as said Commission may determine;

57. Authorizing said Commission to submit any proposition concerning its powers or trusts at any municipal election in like manner;

58. Providing that if a majority of the votes cast thereon shall be in favor of any proposition submitted it shall thereby be adopted;

59. Providing that in case alternative propositions are submitted, and each receives a majority, then the one receiving the greater affirmative vote shall be the one adopted;

247 60. Providing that such adoption shall be sufficient authorization for the issuance of the bonds thereby provided for;

61. Providing that said bonds, when issued, shall be and constitute an indebtedness of the City and County of Denver for the purposes aforesaid;

62. Providing that any such bonds shall be issued, sold and redeemed solely as in said Section 264A provided;

63. Repealing all provisions of the Charter in conflict with said Section 264A, of which there are many;

64. Committing the City and County of Denver to the municipal ownership or operation of the water plant or system supplying water for said City and County of Denver and its inhabitants for all purposes;

65. Depriving the City and County of Denver and the qualified taxpaying electors thereof of all power to grant a new franchise relating to any street, alley or public place of said City and County for water works purposes.

Defendant further avers that owing to the manner in which said questions were submitted to the people, no qualified elector voting in favor of one or more of the numerous matters and things in said proposed section contained, but opposed to other of said matters and things, could vote for the matters and things, or either of them, which he favored without at the same time voting for all those matters and things therein contained to which he was opposed; that there was room for and there was a fair difference of opinion

248 among the electors of the City and County of Denver qualified to vote and voting at said election in the month of May, 1910, in reference to said various and numerous different questions

and matters therein contained, but that it was impossible under the circumstances for the voters to give expression to their will in respect thereto, and the vote taken upon said proposed Section 264A does not indicate and is not a fair or any expression of the will of the voters in regard thereto; that the total registered vote of electors legally qualified to vote on said amendment prior to and for said election in the month of May, 1910, was in number 74,647; that the total number of votes cast at said election by voters legally qualified to vote on said amendment was 61,667; that the number of votes cast both for and against said proposed Section 264A was 23,741, and the number of votes cast in favor of its adoption was 12,342; that the manner of the submission of the question of the adoption or rejection of said proposed amendment 264A violated the Constitution and laws of the State of Colorado and the Charter of the City and County of Denver, particularly Section 179 thereof, and was such as to constitute in law and in equity a fraud upon the electorate, and said proposed amendment 264A has never been legally or at all adopted, is not now in effect, and has no force or validity.

Twelfth. This defendant further avers that the said Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows are not severally or collectively the duly elected or qualified members of nor do they constitute the said Public Utilities Commission of said City and County of Denver, although they are assuming to act as such;
249 that the office for which their names were proposed for election at said election in May, A. D. 1910, had not at any time prior to nor at the date of said election been created, nor did it exist; that the said persons were not, nor was either of them, in any manner duly or at all nominated for said office, although in and by the existing Charter of the City and County of Denver, and by the provisions of the statute of the State of Colorado in such case made and provided, it was and is required that no name of a candidate for any office be placed upon the ballot to be used for any election, nor voted upon at such election, unless such persons shall be previously duly nominated either at a convention of delegates of a political party, or by a committee duly authorized by such a convention so to do, or by petition as in said statute provided, a certificate of such nomination to be filed in the case of nominations for offices to be filled by the voters of any city or town, with the Clerk of said city or town, not more than thirty nor less than fifteen days before election, if made otherwise than by a convention or a committee, and not later than five days after the date of such nomination, if made by convention or committee; and likewise requiring the publication and posting of the lists of nominations in the manner and for the time in said statute provided, and the affording of an opportunity for the filing and determination of objections to said nominations; and likewise requiring every person nominated for any public office to accept such nomination in writing within five days after the filing of the certificate or nomination paper containing the name; and that further, in and by said statute applicable to said election it was provided
250 that such ballot should contain no other names of persons who were candidates for any office to be balloted for at said election except those nominated in the manner aforesaid, and that

the names of the candidates for each office should be arranged under the designation of the office in alphabetical order, so that votes might be cast for or against each candidate individually; and further providing that there should be left at the end of the list of candidates for each different office as many blank spaces as there might be persons to be elected to such office, in which the elector might write the name of any person not printed on the ballot for whom he desired to vote as a candidate for such office. And this defendant avers that each and all of the various requirements hereinabove specified were wholly neglected and disregarded in the case of the supposed election of said Anderson, Van Cise and Fellows, and each of them; that neither of said persons was nominated for the office of member of the Public Utilities Commission by any of the methods in said statutes provided, nor was any certificate of nomination as to any of said persons filed as required, nor was any acceptance thereof made, nor was there any published or posted notice given as required in the statute of the fact of such nomination or nominations, nor was any opportunity afforded in any maner to object to said nominations, or either thereof, nor were the names of said candidates, or either of them, printed upon the ballot in the form and manner as required in said statute, nor were the electors afforded an opportunity to vote for or against either of said candidates individually, nor were the electors in any manner afforded an opportunity to vote in
251 favor of any other person or persons whatsoever for said office of member of the Public Utilities Commission.

Thirteenth. This defendant further avers that said Section 264A was and is wholly invalid and violative of Article XX of the Constitution of the State of Colorado, in this, to-wit: that in and by section 4 of said Article it is provided that the question of granting a franchise relating to any street, alley or public place of the said City and County shall be submitted to vote of the qualified taxpaying electors of said City and County, upon deposit with the Treasurer of the expense (to be determined by said Treasurer) of such submission by the applicant for such franchise; and in and by section 5 of said Article it is provided that when qualified electors of the City and County of Denver, in number not less than five per cent. of the next preceding gubernatorial vote in said City and County, shall petition the Council for any measure, the Council shall submit the same to a vote of the qualified electors at the next general election, not held within thirty days after such petition is filed, and whenever such petition is signed by qualified electors, in number not less than ten per cent. of the next preceding gubernatorial vote in said City and County, with a request for a special election, the Council shall submit such measure at a special election to be held not less than thirty nor more than sixty days from the date of filing the petition; whereas, in and by the terms of said Section 264A, said The City and County of Denver is deprived of all powers relating to supplying the City and County of Denver and its inhabitants with water for all uses and purposes, except as the same are enumerated in said Section 264A; and in and by said Section 264A the
252 said City and County of Denver has no power in regard to such water supply except to acquire by purchase, lease or

construction of a municipal water works plant or system, and to operate the same, and is without power to grant any new franchise relating to any street, alley or public place to any private individual or corporation for the purpose of furnishing such water supply, or to enter into a contract with any private individual or corporation for said purpose.

Fourteenth. Defendant further avers that said Section 264A is wholly invalid, and was never properly or at all adopted, for the reason that the matters and things therein contained do not constitute a proper or any amendment to the existing Charter of the City and County of Denver, but constitute a wholly new and independent charter or charter provision, complete in itself and relating to the supplying of said City and County of Denver and the inhabitants thereof with water for all uses and purposes; that under and in pursuance of said Article XX of the Constitution of the State of Colorado it is not and was not at the time of said election in May, A. D. 1910, or at any time prior thereto, proper, legal or permissible to adopt or attempt to adopt or to submit for adoption as an amendment to the existing Charter, and without the calling of a charter convention to consider the same, any new charter or any additional or supplemental charter; but that in all such cases it was and is necessary, and a condition precedent to the submission or adoption of any such new, additional or supplemental charter, that the question of the holding of a charter convention to consider the
253 same should first be submitted to the qualified electors; that thereafter said charter convention, elected and constituted, as in said Article XX provided, should convene and as a representative deliberative assembly consider, adopt and approve said proposed new, additional or supplemental charter, and that only after such approval by said charter convention could such new, additional or supplemental charter be submitted to the qualified electors for their approval and adoption or rejection; and that all of these matters were entirely neglected in reference to the submission and supposed adoption of said Section 264A; that no charter convention in reference thereto was held or attempted to be held, nor was the question of the holding of such a convention submitted or attempted to be submitted to the qualified electors; but that said matter alleged to constitute said Section 264A was immediately placed upon the ballot and submitted to the vote of the electors, without previous consideration, deliberation or reflection by the representatives of said electors in charter convention assembled, or otherwise, or at all.

Fifteenth. This defendant further avers that said Section 264A was and is wholly invalid and in conflict with the Constitution of the United States as well as with the Constitution of the State of Colorado, in that it impairs the obligation of prior existing contracts between said The City and County of Denver and this defendant, contrary to Section 10 of Article I of the Constitution of the United States, and Section 11 of Article II of the Constitution of the State of Colorado, in that, whereas, by said contracts then and now existing the City and County of Denver was obligated to this defendant to

purchase the water works system or plant of this defendant,
254 and to pay therefor the value to be arrived at by appraisement as in said Ordinances No. 44 of the Series of 1890 and No. 163 of the Series of 1907 duly set forth; or, in lieu thereof, was obligated to renew the franchises and privileges evidenced by said Ordinance No. 44 of the Series of 1890 for an additional period of twenty years from and after the 10th day of April, A. D. 1910; and in and by said existing contracts was and is obligated to take water for all uses and purposes solely and exclusively from this respondent through its water works system or plant and not otherwise, and to pay therefor the rates specified for said second period of twenty years in said Ordinance No. 44 of the Series of 1890; nevertheless, in and by said Section 264A, which, if it was properly adopted, is a law, said City and County of Denver is forbidden to grant any new franchise to any private individual or corporation covering the supply of water to said City and County or its inhabitants, for any purpose, and is forbidden to obtain such supply except from a plant owned or leased and operated by said City and County of Denver; and is forbidden to purchase the water works system or plant of this defendant except at the price of $7,000,000.00 in bonds of the City and County of Denver, as in said Section 264A specified, or for such price as may be approved by said Public Utilities Commission and ratified by the qualified electors; and is authorized to proceed immediately to the acquisition and operation of its own water works system or plant, and to supply therefrom said City and County of Denver and the inhabitants thereof with water for all uses and purposes; and said City and County of Denver is required, in case bonds
to the amount of $8,000,000.00 are authorized therefor, to
255 proceed at once to construct and put into operation a complete system of water works for supplying said City and County and the inhabitants thereof with water for all uses and purposes; and is denied the right to purchase or acquire or exercise any option, right, privilege or power of purchasing or acquiring any water plant or system from any person, persons or corporation except upon a vote of the qualified electors first had and obtained, authorizing the same; and is likewise denied the right or power to purchase and acquire any water system or plant, or to extend any contract with reference thereto, except upon such vote, notwithstanding the binding obligations of said existing contracts between said City and County and this defendant, requiring said City and County either to purchase said water works system or plant of this defendant or to renew said contracts and said franchises or privileges for the additional period of twenty years, without regard to any such vote.

Sixteenth. This defendant further avers that said Section 264A was and is wholly invalid and in conflict with the Constitution of the United States, in this, to-wit, that thereby this defendant is denied the equal protection of the laws, contrary to the provisions of Article XIV of the amendments to the Constitution of the United States and the corresponding provisions of the Constitution of the State of Colorado, including Section 25 of Article V thereof,

for the reason that, whereas under Article XX of the Constitution of the State of Colorado and the Charter of said The City and County of Denver, all persons and corporations desiring to engage in the business of supplying to said City and County of Denver and the inhabitants thereof transportation, light, heat, power, tele-
256 phone and telegraph service and other matters and things commonly designated as public utilities, are privileged to and may obtain franchises for any such purposes relating to the streets, alleys and public places of said City and County of Denver, such franchises are denied to and cannot be obtained by persons or corporations, such as is this defendant, engaged in the business of furnishing said City and County of Denver with water, nor can such business of furnishing water under the terms of said Section 264A be carried on in said City and County of Denver by any private individual or corporation; and further, because in and by Article IX of the Charter of said City and County, in respect to the acquisition by purchase, condemnation, construction or otherwise, by said City and County of Denver, of any public utility, work or way other than a water works system, the same cannot be acquired by purchase, condemnation, construction or otherwise, except upon the filing of a petition signed by qualified electors, in number not less than twenty-five per cent. of the next preceding vote for Mayor, describing the proposed public utility work or way, and requesting the acquisition of the same, and except after investigation and report by the Board of Public Works covering the method of such acquisition, the probable cost thereof, the preparation of specifications, plans and details for that purpose, the determination as to whether the same can be operated by the City and County at a profit or advantage, either in quality or cost of service, and a report of the conclusions of said Board to the Mayor and Council in writing; and in case such report is favorable, the legal opinion of the City Attorney on all matters of law involved in such proposition, the con-
257 currence or not concurrence of the Mayor therein, the preparation by the Board of Public Works of full specifications, plans and details, with a revised estimate of the total maximum cost, the submission to the City Council of a bill for an ordinance providing for the acquisition of such public utility, and setting forth the full description thereof, the revised total maximum estimated cost, the manner in which it shall be acquired and the maximum amount of bonds to be issued, the number of installments and time when such bonds shall mature and the rate of interest thereon, the passage by both branches of the City Council and the approval by the Mayor of such ordinance, and finally the submission to the qualified taxpaying electors of the question of issuing the bonds necessary for the purpose of said acquisition; all of which are valuable and important safeguards to the investment of any sum or sums of money whatsoever by private individuals or corporations in the business of supplying any such public utility to the City and County of Denver; but in and by said Section 264A this defendant, and all other persons and corporations engaging or proposing to engage in the business of supplying water

to said City and County of Denver and the inhabitants thereof, are without any right or reason denied the protection thus afforded to all other persons and corporations whatsoever, and their property is subject to be taken or destroyed, or the value thereof greatly impaired by the passing whim or caprice of the public or at the uncontrolled will of the three persons constituting or assuming to act as the Public Utilities Commission of said City and County of Denver.

258 This defendant further avers that said section 264A likewise constitutes a denial to this defendant of the equal protection of the laws, as between this defendant and other persons and corporations engaging or proposing to engage in the business of supplying water to said the City and County of Denver and the inhabitants thereof, in this, to-wit: That, whereas the proposal to acquire by purchase the water works system or plant of this defendant for and at the price of $7,000,000.00 as aforesaid was originated, submitted to a vote of the people and received a majority of the votes cast thereon without in any manner whatsoever complying with any of the said requirements of Article IX of the existing Charter of said City and County of Denver as hereinabove set forth; and, whereas said Public Utilities Commission is in respect to the property of your defendant authorized, of its own motion and without previous compliance with any of said provisions of said Article IX, immediately to submit to the vote of the qualified electors the question of issuing bonds to any amount, for the purpose of effecting such purchase of this defendant's property, yet in respect to the property of all other persons and corporations engaged in the business of supplying water to said City and County of Denver or the inhabitants thereof, or any part or portion of the same (some parts or portions of which were and are supplied with water by other persons or corporations, although this defendant supplies the major part and portion thereof), it was prior to the alleged adoption of said section 264A and is now required that all of said provisions and safeguards of said Article IX be first observed and fulfilled before any such proposition could or can be submitted to or approved by the qualified electors.

259 Seventeenth. This defendant further avers that said so-called section 264A is invalid, in that it constitutes a deprivation of this defendant's property without due or any process of law, and a taking or damaging of same without compensation previously or at all paid or provided for, contrary to Article XIV of the Amendments to the Constitution of the United States, and contrary to section 25 of Article II, and section 15 of Article II of the Constitution of the State of Colorado, in this, to-wit: That the contract rights of this defendant, whereby the City and County of Denver was and is obligated either to purchase the water works system or plant of this defendant for and at a price to be arrived at by appraisement as aforesaid, or, failing in that, to renew said Ordinance No. 44 of the Series of 1890 for an additional period of twenty years as hereinabove set forth, were and are valuable property rights, of which this defendant has been at all of said times and is now seized and possessed; and that said section 264A, by its terms, purports to

deprive this defendant of said property rights and each thereof and to destroy the same without due or any process of law, and that the illegal, inequitable and unconscionable conduct and acts of said City and County of Denver, including the proposal and alleged adoption of said section 264A are all in pursuance of the wrongful plan, conspiracy and system conceived by said defendant, the City and County of Denver, and certain politicians, agitators and newspapers therein, for the purpose and with the intent of impairing, damaging and in a large measure destroying this defendant's property as aforesaid, so that the same may be taken and acquired by said The City and County of Denver at greatly less than its true value,
260 and without making just compensation therefor.

Eighteenth. This defendant further avers that Article XX of the Constitution of the State of Colorado, under which the present Charter of the City and County of Denver was adopted, and all acts and steps taken thereunder, including the supposed adoption of said section 264A, were and are unconstitutional and invalid, for the reason that said Article XX of the Constitution of the State of Colorado, as well as said section 264A, and the method of its supposed adoption, are in violation of section 4, Article IV of the Constitution of the United States, guaranteeing to and requiring in the State of Colorado a Republican form of Government, as well as in violation of section 4 of the Act of Congress approved March 3, 1875, and entitled "An Act to Enable the People of Colorado to Form a Constitution and State Government, and for the Admission of Said State into the Union on an Equal Footing with the Original State," wherein and whereby it is required that the Constitution of said State of Colorado shall be Republican in form and not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence; and likewise in violation of section 2, Article II and section 1, Article V of the Constitution of the State of Colorado, for the reason that said Article XX and said section 264A destroy a Republican form of Government in a portion of the State of Colorado and the exercise of powers vested exclusively in the General Assembly of the State of Colorado; and for the further reason that said Article XX is in violation of section 2 of Article XIX of the Constitution of the State of Colorado, in that said
261 Article XX was not submitted to the People of the State of Colorado in accordance with the requirements of the Constitution of said State; that said Article XX contained and contains more than one amendment to said Constitution as it then existed, and that each separate amendment was not voted upon separately; that said Article XX was not in the nature of an amendment to the then existing Constitution, but an addition thereto, and that either as an addition or an amendment it attempted to amend and did alter and amend more than six previously existing articles of said Constitution; that while the validity and constitutionality of Article XX of the Constitution of the State of Colorado has been passed upon by the Supreme Court of the State of Colorado and sustained, such determination and judgment was reached without a consideration of the constitutional objections herein alleged and by virtue

of a certain construction of Article XX, limiting and restricting its meaning, which said construction has heretofore been adhered to by the Supreme Court of the State of Colorado in a line of decisions involving the construction of said Article XX, and in and under which decision not only the rights of the constitutional officers have been determined, but the Government of the City and County of Denver has been carried on; but that recently an original proceeding has been begun and is now pending in the Supreme Court of the State of Colorado entitled People ex rel. Barnett, Attorney General, vs. George B. Curtice et al., being in the nature of a quo warranto proceeding, of which the Supreme Court of the State of Colorado has taken jurisdiction, the object and purpose of which is directly to attack and overthrow the former final decision of said Court
262 constructing the meaning of Article XX of the Constitution of the State of Colorado; that the constitutionality of Article XX could only have been established upon the construction heretofore given to said Article by said Supreme Court, and that in case said construction is so altered it will necessitate a review and reversal of the decisions sustaining the constitutionality of Article XX; that since the Supreme Court of the State of Colorado has taken jurisdiction of such proceeding, the former decisions on the same subject are open for rehearing and the questions therein raised are not finally determined so far as other and independent courts are concerned.

Nineteenth. Defendant further avers that none of the provisions and requirements of Article IX of the existing Charter of the City and County of Denver in respect to the acquisition by purchase, condemnation, construction or otherwise, by said the City and County of Denver, of any public utility, work or way, as heretofore in paragraph Sixteen of this cross-bill set forth, have been in any manner or at all observed or fulfilled, either in respect to the acquirement by purchase, condemnation or otherwise of this defendant's water works system or plant, or any part thereof, or in respect to the acquisition of a new, independent and complete system of water works by construction, or the authorization or issuance of bonds for that purpose, or the submission to the qualified electors of the question of authorizing or issuing such bonds, as is now contemplated to be done at said Special Election on the first Tuesday in September, 1910; but, on the contrary, all of said provisions of Article
263 IX of said existing charter of the City and County of Denver, as well as other provisions of said Charter relative to the submission of the question of issuing said bonds, and the form thereof and the method of their issuance and payment, have been violated and will be further violated by such Special Election proposed to be held in September as aforesaid, and by a submission thereat of the question now proposed to be submitted, and by the issuance of all or any of the bonds now proposed to be authorized thereat, and by the use of the same in any manner for the purpose contemplated.

Twentieth. This defendant further avers that in reliance upon its contract relations with said the City and County of Denver as

hereinabove set forth, and upon the obligation of said City and County of Denver, either to purchase all of this defendant's water works system and plant and pay for the same at the valuation to be fixed by appraisement, or, failing in that, the obligation of said the City and County of Denver to renew said Ordinance No. 44 of the Series of 1890 for an additional period of twenty years from and after April 10th, 1910—this defendant has invested large sums of money, to wit: Many millions of dollars, in the acquisition, completion and enlargement of said water works system and plant; all with the knowledge and consent of said the City and County of Denver (which then and there well knew the claims and understanding of this defendant as to its contract rights aforesaid and assented thereto and concurred therein) and the inhabitants thereof; and for the purpose of providing adequate and sufficient service and pressure to meet the increasing needs and demands of said City and
264 County of Denver and the inhabitants thereof, this defendant has, within the past year, expended a large sum of money in new construction including the construction of a new forty-eight inch conduit 64,440 feet in length, for the conveyance of water from its storage reservoirs to the distributing system within the city, at a cost of $350,769.74, of which $246,444.44 has been expended since April 10, 1910; and including also the laying of new and larger distributing mains in the streets, alleys and public places of certain portions of the City and County of Denver, to facilitate the distribution of water and increase the pressure thereof, for the comfort, convenience and safety of the inhabitants and including other additions and betterments—all of which has been done since said April 10, 1910, and at a cost exclusive of said conduit of $57,996.05; and that further additions to and enlargements of said water works system and plant are now and will in the future be necessary to afford proper distribution of water and the necessary pressure to the rapidly growing city—all of which this defendant is willing and offers to undertake and do, and will do unless prevented by the wrongful, illegal, inequitable and unconscionable acts of said the City and County of Denver, the so-called Public Utilities Commission, and the members thereof, and certain of the inhabitants of said the City and County of Denver as hereinabove stated.

Twenty-first. Defendant further avers that said the City and County of Denver, notwithstanding its contract obligations as hereinabove set forth, has heretofore failed and refused, and does now fail and refuse to grant any renewal whatsoever of said Ordi-
265 nance No. 44 of the Series of 1890, or any part or portion thereof; and likewise has failed and refused, and still does fail and refuse to recognize in any way any such renewal or right of renewal on the part of this defendant, but on the contrary, said the City and County of Denver and the officers, agents and representatives thereof, and the inhabitants and users of water therein, incited thereto by certain agitators and newspapers, have since said April 10, 1910, claimed and asserted and still do claim and assert and insist that all rights of this defendant under or by virtue of said Ordinance No. 44 of the Series of 1890, or any other ordinance or

contract whatsoever in reference to the supplying of water to said City and County of Denver or the inhabitants thereof, or any part or portion of the same, ceased, terminated and came to an end on said April 10, 1910, and for that reason have failed and refused and still do fail and refuse to comply with the reasonable rules and regulations from time to time promulgated by this defendant and in effect, with reference to the use of the water furnished and supplied by this defendant and governing the hours of irrigation and other like matters; and yet at the same time, and in spite of said illegal, inequitable and unjust attitude hereinabove recited, said the City and County of Denver and the inhabitants thereof, and the users of water therein have claimed and insisted and do now claim and insist that this defendant shall continue in the business of supplying water to the City and County of Denver and the inhabitants thereof for all uses and purposes, as it has heretofore done, and shall from time to time make enlargements of and betterments to its
266 plant and distributing system for the purpose of affording such service and water pressure as said city and its inhabitants claim to be entitled to, and expend large sums of money therefor, until such time as said City and County of Denver, through the inequitable conduct hereinabove described, shall be able to acquire the water works system and plant owned or controlled by this defendant at such grossly inadequate price as said the City and County of Denver may deem fit to pay, or until such time as said City and County of Denver may have completed and put into operation its own separate, independent competing municipal water plant for the purpose of furnishing such supply of water. And your defendant avers that even if it were true that there now exists no franchise or contract relations under or by virtue of which it is authorized to supply the City and County of Denver and the inhabitants thereof with water, and for that purpose to maintain and operate its pipes and distributing system within the streets, alleys and public places in said City, yet, in view of the fact that the water works system or plant owned and controlled by this defendant for many years has constituted and now does constitute practically the sole means and source of supply of water to said City and County and its inhabitants for any and all uses and purposes, and that your defendant could not without doing irreparable injury to said the City and County of Denver and all of the inhabitants thereof and property owners therein, exercise its legal right to immediately withdraw from said business of supplying water as aforesaid and devote its property and its capital to other uses and purposes, your defendant has since said April 10, 1910, continued, and is continuing as before said date, to supply water to said City and County of
267 Denver and inhabitants thereof for all uses and purposes, not only under and by virtue of said contract hereinabove set forth for the renewal of said Ordinance No. 44 for the additional period of twenty years, but also under and by virtue of the right, power and authority so to do upon it conferred by virtue of its Charter and franchise received from the State of Colorado, and the licenses, privileges and easements otherwise previously conferred

upon it and its predecessors by said City and County of Denver and its predecessors, and included municipalities.

Twenty-second. That section 264A of the Charter was initiated, prepared and submitted to the electors of the City and County of Denver as part of a plan and conspiracy on the part of the commissioners therein named and certain newspapers and agitators in the City and County of Denver for the purpose of harassing and annoying your defendant; of avoiding the legal obligations of the City and County of Denver under Ordinance No. 44 of the Series of 1890; of impairing the value and injuring the usefulness of the property of your defendant which had theretofore been appraised in the manner herein alleged, and that said commissioners were named in said section 264A of the Charter for the purpose of carrying out the plan and conspiracy hereinabove alleged and regardless of the legal right of your defendant or the value of its property and water plant; that at the time of the submission and adoption of said section 264A, neither the commissioners therein named, nor any other person or persons or representatives of the City and County of Denver,
268 nor the City and County of Denver had made any investigation or examination of the property and water plant of your defendant or the value thereof, except such as had been made by the appraisers in the manner hereinabove alleged; but that arbitrarily, in ignorance of the extent and value of the property of your defendant, and for the purpose of compelling and inducing it to part with its property and to sell the same to the City and County of Denver for less than its real and actual value, a valuation of $7,000,000.00 was set upon said property and an offer thereof made by said section 264A; that since the alleged adoption of said section 264A of the Charter and the alleged qualification of the commissioners therein named, said commissioners have called upon your defendant to comply with the provisions of said section 264A of the Charter, and to sell, transfer and assign all of its property covered by the appraisement heretofore had at and for the sum of $7,000,000.00, to be paid as in said section 264A of the Charter prescribed, regardless of the appraised value of $14,400,000.00 and the actual value of said property, which is largely in excess of said appraised value; which said offer of said $7,000,000.00 has been by your defendant refused. That since the adoption of said Section 264A and the qualification of said Commissioners, they have publicly announced themselves as opposed to said appraised value of $14,400,000 or the consummation of said purchase upon the basis of said appraisement, and have attempted in a desultory manner and superficially to inspect the property of your defendant and to deny the value thereof, for the purpose of further harassing and annoying your defendant and of impairing the value of its property, and for the purpose of sustaining said Commission in its arbi-
269 trary offer of $7,000,000, regardless of said appraisement and the value thereby found.

Twenty-third. That the City and County of Denver is dependent for its supply of water and that of its inhabitants solely upon the property and plant of your defendant, The Denver Union Water

Company, and is insisting that your defendant continue to supply water to it and its inhabitants, and your defendant is so doing; that said City and County of Denver and its inhabitants have consumed on an average 55,374,016 gallons of water per day since the 17th day of May, 1910, which, on an estimated population of 200,000 people, is an average of 277 gallons per day per person, a consumption which is not exceeded in any city of the United States, and which is more than treble the average per capita consumption in the largest and corresponding cities in the United States; that this enormous consumption of water, while, partly due to the extravagant use thereof by the City and County of Denver and its inhabitants, is also due to the peculiar situation of the City and County of Denver in regard to soil and climate and the necessity for an abundant use of water, not only to insure the beauty of the City and County of Denver and the comfort of its inhabitants, but their safety and health. That since the passage of section 264A of the Charter the demands by the City and County of Denver and its inhabitants for the extension and enlargement of the property and plant of your respondent, in order to give an adequate water supply, have been large and caused by the rapid and constant increase in the population of the City and County of Denver and the growth of said City and County of Denver; that said con-

270 dition is not an unusual or exceptional one, but will continue to exist as long as said City and County of Denver shall continue to grow, and that from time to time it will be necessary for your defendant, or any person or corporation engaged in supplying water to the City and County of Denver and its inhabitants, to be prepared to make yearly additions and enlargements at a large expense and cost. That by reason of the claims and contentions of the City and County of Denver, as herein set forth, and the action of the commissioners named in said section 264A the acts therein contemplated and being done, and particularly the steps being taken, as herein alleged, to submit the question of a bond issue of $8,000,000.00 to the taxpaying electors of the City and County of Denver on the first Tuesday in September, 1910, and the threatened issuance of said bonds and the use of the proceeds thereof for the purpose of erecting a competing and independent municipal water plant, and the disregarding and threatened continued disregarding of the rights of your defendant under Ordinance No. 44 of the Series of 1890, your defendant is unable to procure or borrow the sums of money necessary for the enlargements and extensions of its property and system, as in this cross bill alleged to be necessary, and that the threats and actions of the City and County of Denver, as herein alleged, have resulted in a serious impairment of the credit of your defendant and have seriously impaired the value of its property and plant; that said injury and damage, as hereinabove alleged, is of a continuing character and one which it is difficult to fix in money, and casts a cloud upon the title of your defendant to its property and contract rights.

271 Twenty-fourth. That regardless of the rights of your defendant as hereinabove alleged and the obligations of the

defendant the City and County of Denver, and in direct violation thereof, as hereinabove alleged, the City and County of Denver and Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows, as the alleged members of and constituting the Public Utilities Commission of said City and County of Denver, have proceeded, pursuant to the terms of section 264A, to have introduced in and enacted by the City Council Ordinance No. 98 of the Series of 1910 of the City and County of Denver, a copy of which is by reference made a part of this cross-bill, identified as Exhibit "D", and hereto attached, and pursuant to the terms of said section 264A and said Ordinance No. 98 of the Series of 1910, are proceeding to take and taking the steps necessary to hold an election on the first Tuesday in September, 1910, for the purpose of submitting to the qualified taxpaying electors of the City and County of Denver the question of authorizing an issue of $8,000,000.00 in bonds of the City and County of Denver, in the manner and form in said section 264A and said Ordinance No. 98 of the Series of 1910 provided; and are further threatening, in case said bond issue shall be so authorized, to use the proceeds thereof for the construction of an independent competing municipal water plant, as in said section 264A and Ordinance No. 98 of the Series of 1910 provided, and for that purpose are threatening to and will, unless restrained by order of this Court, execute, attest, register, issue and sell to bona fide purchasers thereof for value, the said bonds so authorized.

272 Twenty-fifth. That your defendant, The Denver Union Water Company, is the owner and possessor of the property and water works system hereinabove described, and ever since its organization has been a taxpayer of the City and County of Denver; that its property located in the City and County of Denver, and not including any portion located outside thereof, was assessed for the year 1909 for the amount of $2,500,000.00, and that the total assessed value of all of the property in the City and County of Denver for said year 1909 was $132,909,000; that your defendant is the owner and possessor of property in the City and County of Denver of the assessed value of a little less than two per cent. of the total assessed value of all property in said City and County of Denver; that as taxes on said property so assessed in the year 1909 and payable in the year 1910, your defendant, The Denver Union Water Company, has paid the sum of $90,826.40, just a little less than two per cent. of the total amount of taxes paid by all taxpayers in the City and County of Denver; that for the year 1910 the property of your defendant, The Denver Union Water Company, in the City and County of Denver, has been again assessed at $2,500,000.00, and the total assessed value of all of the property in said City and County of Denver will be, as your defendant is informed and believes, approximately the same as in the year 1909, and your defendant will pay and continue to pay a little less than two per cent. of the total taxes of the City and County of Denver; that should said bond issue of $8,000,000.00 by the City and

273 County of Denver be authorized at the election to be held on the first Tuesday in September, 1910, as stated and pro-

vided for in section 264A of the Charter of the City and County of Denver, and Ordinance No. 98 of the Series of 1910, and should said bond issue become a binding obligation on the City and County of Denver and its taxpayers, then your defendant will be called upon to contribute, through the regular and annual assessments and levies, taxes but little less than two per cent of said $8,000,000.00, and approximately the sum of $150,000.00 without any reference to the interest charge and other annual charges for operation and maintenance.

Twenty-sixth. That your defendant has no plain, speedy or adequate, or any remedy at law; that it hereby offers to fully perform each and all of its obligations to the City and County of Denver under and by virtue of Ordinance No. 44 of the Series of 1890, including the renewal thereof for the term of twenty years from April 10, 1910, or otherwise, and all other existing contracts and to abide by any order or decree of this Honorable Court in the premises, which may be made herein; that, unless prevented by order of this Honorable Court, the City and County of Denver will persist in its inequitable and unconscionable purpose, and will refuse to abide by and perform the obligations imposed upon it by Ordinance No. 44 of the Series of 1890 and the proceedings thereunder as hereinabove set forth, all of which will necessarily result in great and irreparable injury to your defendant, not only in respect of its contract rights hereinabove set forth, but also in respect
of its rights as a property owner and taxpayer within said
274 City and County of Denver, and to the business in which
it is lawfully engaged and necessarily must continue to engage as stated above.

Defendant further avers that said Section 264A, said Ordinance No. 98 of the Series of 1910, said election proposed to be held on the first Tuesday in September, 1910, the bonds proposed to be authorized thereat, if authorized, and all, each and every thereof, and all of the steps taken or to be taken and matters and things done or to be done under or by virtue of said Section 264A, and the refusal of the City and County of Denver to recognize the right of this defendant under and by virtue of said Ordinance No. 44 of the Series of 1890, or to grant any renewal thereof, were, are and will be wholly illegal, inequitable, unconscionable and contrary to and destructive of the vested contract and property rights of this defendant; and were, are and will be calculated and intended to further complicate the situation, to harass this defendant, to impair and destroy the property of this defendant and the value thereof and to cast a cloud upon its title, and to impose upon this defendant and its property, as well as upon the property of all other taxpayers within said City and County of Denver an enormous, unjust, illegal and unnecessary burden of taxation; all of which is threatened to be and will be consummated and carried into effect unless prevented by injunctive order of this Honorable Court.

Wherefore, and in as much as your defendant is without remedy at and by the strict rules of the common law, and can have relief only in a court of equity, where matters of this nature are properly

cognizable and reviewable, it brings this its cross-bill, and prays, the premises considered:

275 1. That your Honors may grant unto your defendant the writ of subpœna, directed to the defendants, The City and County of Denver; Robert W. Speer as Mayor of the City and County of Denver; Burt F. Davis as Clerk of said City and County of Denver; Albion K. Vickery, as Auditor of said City and County of Denver; Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows, claiming to be and assuming to act as members of and constituting the Public Utilities Commission of said City and County of Denver, and Ellis Meredith, A. E. Mauff and Harry Petrie, as members of and constituting the Election Commission of said City and County of Denver, and The New York Trust Company, complainant, thereby commanding each of them, at a certain time and under a certain penalty therein to be named, personally to be and appear before this Honorable Court, then and there to answer all and singular the matters aforesaid (but not under oath, all answers under oath being hereby expressly waived), according to the practice and rules of this Court, and to stand to and abide by and perform such orders, directions and decrees as shall be made herein and as to your Honors shall seem equitable and just, including the writ of injunction as hereinafter prayed for, and that the said complainant, The New York Trust Company, being a non-resident of and absent from the State of Colorado, the service of said subpœna so issued and directed to it be made upon Henry McAllister, Jr., one of its counsel and solicitors of record herein, and that such service stand and be

276 held and deemed by your Honors sufficient service of said writ of subpœna upon said complainant, The New York Trust Company.

2. That your Honors do grant your defendant a writ of injunction, issued out of and in accordance with the rules and practice of this Honorable Court, to be directed to the defendants herein named, except The South Platte Canal and Reservoir Company, to restrain them and each of them, and their respective successors in office and each of them, and all officers, agents, servants, employés, representatives and confederates of them or any of them from holding or attempting to hold on the first Tuesday in September, 1910, the election as now proposed and set forth in Section 264A of the Charter and Ordinance No. 98 of the Series of 1910, or at any other date whatsoever, for the purpose of submitting the question of the issuance of said $8,000,000.00 of bonds, or any amount whatsoever, as in said Section 264A and Ordinance 98 aforesaid set forth, and from issuing or attempting to issue said bonds or any of them, for any purpose whatsoever, and from interfering or attempting to interfere with or obstruct this defendant in the exercise and enjoyment of its contract and franchise rights under said Ordinance 44, Series of 1890 and otherwise and from doing or attempting to do any act or thing tending to accomplish any of such purposes: and until the application for an injunction can be heard, that a restraining order to the same effect be granted, and upon a final hearing such injunction be made perpetual.

3. That a decree be entered herein fixing and determining the rights of your defendant under Ordinance No. 44 of the
277 Series of 1890 and the action which has heretofore been taken by the parties thereunder, and decreeing that your defendant is entitled to a renewal of said contract and franchise for the term of twenty years from April 10, 1910, on the terms and under the conditions in said ordinance set forth; and that the defendants, except The South Platte Canal Company, each in their respective offices and duties, take such steps as may be necessary to grant and effectuate such renewal to your defendant, or, in lieu thereof, that a commissioner be appointed for the purpose of giving effect to the decree of this Court on such matters; and that said defendants, except The South Platte Canal Company, and each of them, their respective successors in office and each of them, and all officers, agents, servants, employès, representatives or confederates be forever enjoined from in any manner interfering with the enjoyment of the full rights of said renewal by your defendant, The Denver Union Water Company.

4. That Section 264A of the Charter of the City and County of Denver be declared unconstitutional, null and void and of no effect whatsoever, and that all further action thereunder be forever restrained and enjoined.

5. That your defendant may have such other, further and different relief as the equity of the case may require and as to
278 your Honors may seem fit, and that it be decreed its costs in this behalf laid out and expended.

THE DENVER UNION WATER COMPANY,
By D. H. MOFFAT, *President.*
GERALD HUGHES,
Solicitor for The Denver Union Water Company.

CLAYTON C. DORSEY,
WILLIAM V. HODGES,
A. M. STEVENSON,
Of Counsel.

UNITED STATES OF AMERICA,
District and State of Colorado,
City and County of Denver, ss:

D. H. Moffat, being first duly sworn, on his oath deposes and says: that he is President of the defendant The Denver Union Water Company; that said defendant is a corporation and for that reason he makes this verification in its behalf; that he has read the foregoing cross-bill and knows the contents thereof; that the same is true of his own knowledge, except as to matters therein stated on information and belief, and as to those he believes it to be true.

D. H. MOFFAT.

Subscribed and sworn to before me, this 25th day of August, A. D. 1910. My commision expires February 21, 1911.

[NOTARIAL SEAL.] FRANK J. DENISON,
Notary Public.

279 "EXHIBIT A."

Denver, Ordinance No. 44, 1890.

SECTION 1. The right and privilege of laying down, continuing and maintaining water pipes, valves, hydrants and apparatus for the conveyance and distribution of water in, upon, along and through the following streets, avenues, alleys and public places of the city of Denver and additions thereto, to wit:

For the entire length of the following named streets and avenues: First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth, Fifteenth, Sixteenth, Seventeenth, Eighteenth, Nineteenth, Twentieth, Twenty-first, Twenty-second, Twenty-third, Twenty-fourth, Twenty-fifth, Twenty-sixth, Twenty-seventh, Twenty-eighth, Twenty-ninth, Thirtieth, Thirty-first, Thirty-second, Thirty-third, Thirty-fourth, Thirty-fifth, Thirty-sixth, Thirty-eighth, Thirty-ninth, Fortieth, Forty-first, Forty-second, Forty-third, Forty-fourth streets, Cleveland place, Court place, Tremont, Glenarm, Welton, California, Stout, Champa, Curtis, Arapahoe, Lawrence, Larimer, Market, Blake, Wazee, Wynkoop, Wewatta, Delgany, Bassett, Water, Platte, Pierce, Frances, Johns streets, Ashland avenue, Fay street, Bigler street, Fairview avenue, Gray, Bert, Mary, Goss, Arlington, Witter streets, Clear Creek avenue, Mayaud street, Alameda avenue, Byers, Cedar, Maple,
Ellsworth streets, West First avenue, First avenue, West Sec-
280 ond avenue, Second avenue, West Third avenue, Third avenue, West Fourth avenue, Fourth avenue, West Fifth avenue, Fifth avenue, West Sixth avenue, Sixth avenue, West Seventh avenue, Seventh avenue, West Eighth avenue, Eighth avenue, West Ninth avenue, Ninth avenue, West Tenth avenue, Tenth avenue, West Eleventh avenue, Eleventh avenue, West Twelfth avenue, Twelfth avenue, West Thirteenth avenue, Thirteenth avenue, West Fourteenth avenue, Fourteenth avenue, West Fifteenth avenue, Fifteenth avenue, Sixteenth avenue, Seventeenth avenue, Eighteenth avenue, Nineteenth avenue, Twentieth avenue, Twenty-first avenue, Twenty-second avenue, Twenty-third avenue, Twenty-fourth avenue, Twenty-fifth avenue, Twenty-sixth avenue, Twenty-seventh avenue, Twenty-eighth avenue, Twenty-ninth avenue, Thirtieth avenue, Thirty-first avenue, Thirty-second avenue Thirty-third avenue, Thirty-fourth avenue, Thirty-fifth avenue, Thirty-sixth avenue, Thirty-seventh avenue, Thirty-eighth avenue, Thirty-ninth avenue, Fortieth avenue, South Seventh street, South Eighth, South Ninth, South Tenth, South Eleventh streets, Santa Fe avenue, Clark, South Water, South Twelfth, South Tremont, South Thirteenth, Evans, South Fourteenth, South Fifteenth streets, Broadway, Lincoln avenue, Sherman avenue, Grant avenue, Logan avenue, Wasoola street, Parkinson street, Pennsylvania avenue, Pearl street, Washington, Clarkson, Venice, Alta, Corona, Hallett, Corsline, Inslee, Hunt, Franklin, Gilpin, Williams, High, Race, Vine, Green, York streets, Josephine avenue, Columbine avenue, Murdock

avenue, Clayton, Fillmore, Finley avenues, Clellan avenue,
281 Walnut street, Estes, Legge, Parsons, Stallcup, Apple, Banana, Cherry, Damson, Elder, Fruit, Grape, Hazel, Lemon, Melon, Orange, Plum, Miner, Barnum, Marshall, Louis, Randolph, Pacific, East Larimer, East McClellan streets, Allen avenue, Downing avenue, Pierpont street, Emerson avenue, Ogden street, Marion, Lafayette, Humboldt, Backus, Edmonds, Murdock, Scott, Kent, Wanless streets, Bell avenue, Palmer street, Clifton, Justina, Merrill, Converse, Everett, Argo, Lowell, Quincy streets, Prospect avenue, Beecher avenue, Greely avenue, Dakota avenue, Colorado avenue, Wyomin avenue, Erie street, Boulder, Central, Cheyenne, Hartford, New Haven, Division streets, Stanton avenue, McNassar avenue, Corbett street, Montgomery, Winne streets, Gerspach avenue, Williams streets, Center, Vintage, Maple, Logan, Elizabeth, Detroit, St. Charles, Cleveland, St. George, Milwaukee, St. Ann, St. Paul, St. Francis, Washington, Adams, Jefferson, Madison, Monroe, Charles, Jackson, Harrison streets, Colorado boulevard, Titus street, Grand avenue, Park avenue, Agricultural place, Commercial place, and Cheyenne street.

For the entire length of the following alleys:

Alley between First and Second streets, alley between Second and Third streets, alley between Third and Fourth streets, alley between Fourth and Fifth streets, alley between Fifth and Sixth streets, alley between Sixth and Seventh streets, alley between Seventh and Eighth streets, alley between Eighth and Ninth streets, alley between Ninth and Tenth streets, alley between Tenth and Eleventh streets,, alley between Eleventh and Twelfth streets,
alley between Twelfth and Thirteenth streets, alley be-
282 tween Thirteenth and Fourteenth streets, alley between Bassett and Williams streets, alley between Williams and Delgany streets, alley between Delgany and Wewatta streets, alley between Wewatta and Wynkoop streets, alley between Wynkoop and Wazee streets, alley between Wazee and Blake streets, alley between Blake and Market streets, alley between Market and Larimer streets, alley between Larimer and Lawrence streets, alley between Lawrence and Arapahoe streets, alley between Arapahoe and Curtis streets, alley between Curtis and Champa streets, alley between Champa and Stout streets, alley between Stout and California streets, alley between California and Welton streets, alley between Welton and Glenarm streets, alley between Glenarm and Tremont streets, alley between Glenarm street and Grant avenue, alley between Tremont street and Court place, alley between Cleveland place and Court place, alley between Cleveland place and Cheyenne street, alley between Grant avenue and Wasoola street, alley between Wasoola and Parkinson streets, alley between Parkinson and Cheyenne streets, alley between city limits and Gray street, alley between Gray and Bert streets, alley between Bert and Mary streets, alley between Fifteenth and sixteenth streets, alley between Sixteenth and Seventeenth streets, alley between Seventeenth and Eighteenth streets, alley between Eighteenth and Nineteenth streets, alley between Goss and Arlington streets, alley between Arlington and Witter streets,

alley between Witter street and Clear Creek avenue, alley between Nineteenth street and Fairview avenue, alley between Clear
283 Creek and Bell avenues, alley between Bell avenue and Palmer street, alley between Palmer and Clifton streets, alley between Clifton and Justina streets, alley between Justina and Merrill streets, alley between Merrill and Converse streets, alley between Converse and Edmond streets, alley between Everett and Argo streets, alley between West Fourth avenue and Center street, alley between Vintage and Maple streets, alley between Maple and Titus streets, alley between South Seventh and South Eighth streets, alley between South Eighth and South Ninth streets, alley between South Ninth and South Tenth streets, alley between South Tenth and South Eleventh streets, alley between South Eleventh street and Santa Fe avenue, alley between Santa Fe avenue and Clark street, alley between Clark and South Water streets, alley between South Water and South Twelfth streets, alley between South Twelfth and South Tremont streets, alley between South Tremont and South Thirteenth streets, alley between South Thirteenth and South Evans streets, alley between Evans and South Fourteenth streets, alley between South Fourteenth and South Fifteenth streets, alley between South Fifteenth street and Broadway, alley between Broadway and Lincoln avenue, alley between Lincoln avenue and Sherman avenue, alley between Sherman avenue and Grant avenue, alley between Grant avenue and Logan avenue, alley between Logan avenue and Pennsylvania avenue, alley between Pennsylvania and Pearl street, alley between Pearl street and Washington avenue, alley between Washington avenue and Clarkson street, alley between Clarkson and Venice streets, alley between Venice and Alta streets, alley
284 between Alta and Corona streets, alley between Corona and Hallett streets, alley between Corsline and Inslee streets, alley between Hallett and Corsline streets, alley between Inslee and Hunt streets, alley between Hunt and Franklin streets, alley between Franklin and Gilpin streets, alley between Gilpin and Williams streets, alley between Williams and High streets, alley between High and Race streets, alley between Race and Vine streets, alley between Vine and Gaylord streets, alley between Gaylord and York streets, alley between Clarkson street and Emerson avenue, alley between Emerson avenue and Ogden street, alley between Ogden street and Downing avenue, alley between Downing avenue and Marion street, alley between Marion street and Lafayette street, alley between Lafayette street and Humboldt street, alley between York street and Josephine avenue, alley between Josephine avenue and Columbine avenue, alley between Columbine avenue and Murdock avenue, alley between Murdock avenue and Clayton avenue, alley between Clayton avenue and Fillmore avenue, alley between Fillmore avenue and Finley avenue, alley between Finley avenue and Clellan avenue, alley between Clellan avenue and Walnut street, alley between Estes and Legge streets, alley between Legge and Parsons streets, alley between Parsons and Stallcup streets, alley between Stallcup and Apple streets, alley between Apple and Banana streets, alley between Cherry and Damson streets, alley between Damson

and Elder streets, alley between Elder and Fruit streets, alley between Fruit and Grape streets, alley between Grape and Hazel streets, alley between Hazel and Lemon streets, alley between Lemon
285 and Melon streets, alley between Melon and Orange streets, alley between Orange and Plum streets, and in, upon, along and through all extensions of said streets, avenues, alleys and public places, is hereby granted to The Denver Water Company, its successors and assigns, to such extent as the city may lawfully grant the same, subject to be terminated in the manner hereinafter in this ordinance provided.

SEC. 2. The city of Denver shall hereafter, whenever it shall be requested so to do, make a grant to such extent as it lawfully may to said The Denver Water Company, its successors and assigns, of the same rights mentioned in section 1 hereof in and upon any streets hereafter laid out or extended, and will also, whenever requested, make such additional and confirmatory grants to said The Denver Water Company, its successors and assigns, of the rights and privileges mentioned in section 1 hereof, as it may at the time have the lawful right and power to make; all of such further additional and confirmatory grants, if made, to be subject to termination in the manner in this ordinance hereinafter specified.

SEC. 3. The Denver Water Company, its successors and assigns, shall at all times save and hold the city harmless of and from all loss, cost or damage to person or property occasioned by any negligence in the excavation of any street, lane, alley or public place within the city, made by it in the laying of any of its mains, pipes, valves or other apparatus. And whenever the said The Denver Water Company, its successors or assigns, shall open, or cause to be opened, any street, lane, alley or other public place for laying any main, pipe, valve or hydrant, or other apparatus, it shall
286 forthwith restore the same to as good condition as the same was in before any such opening, at its own expense; and in case of any failure so to do for a space of twenty-four hours after the laying of such main, pipe, hydrant, valve or other apparatus shall be completed, notice shall be given to the said company so to do by the officer, for the time being, having charge of the streets in said city; and in case of default for twenty-four hours after such notice the said street may be put in such order by the said city, but at the expense of the said company.

SEC. 4. The said The Denver Water Company shall at all times furnish water from its mains, through connections to be made by parties desiring the same, to premises abutting upon streets in which it may have a pipe laid, upon application of the owners of the same under such rules as now prevail, and such further reasonable rules as it may prescribe, and to enable such owners to obtain such supply of water shall permit connection to be made with its mains and pipes, under its direction, and in such manner and subject to such conditions as it now permits the same.

SEC. 5. The rate to private consumers for water shall not be greater than now charged by the said The Denver Water Company, a schedule of which rates is hereto annexed, marked Schedule A, and

the said The Denver Water Company may require any consumer to furnish a meter and pay for water by meter measurement; Provided, however, That, at any time after five years from date, the city council may require said company to fix schedule rates for private
287 consumers equivalent to the average rate prevailing in the cities of Chicago, St. Louis and Cincinnati for the same service.

SEC. 6. The said The Denver Water Company shall at all times furnish water to the city and to private consumers, of a quality as good as and fit for private consumption as that shown by the analysis made by order of the city of Denver by Professor Joseph A. Sewall in the month of August, 1889.

SEC. 7. The Denver Water Company hereby purchased of the city of Denver four hundred and ninety-three hydrants, now set upon its mains and owned by the city of Denver, for the sum of twenty-five thousand dollars, payable to the city treasurer within four months after the taking effect of this ordinance. And within one year after the taking effect of this ordinance the said The Denver Water Company shall replace all said hydrants with hydrants having two nozzles for hose and one for steamer connection, and with not less than a six-inch barrel. And within six months after this date the city council shall designate the location of so many additional hydrants, to be set upon the present lines of main of The Denver Water Company, as will bring the total number of hydrants upon the present line of main of the said company up to the number of one thousand. And within the said one year after the taking effect of this ordinance the said The Denver Water Company shall cause to be set in the said locations hydrants of the description last aforesaid, so that the number of hydrants upon its present lines of mains shall then be one thousand in number.

SEC. 8. The said company shall at all times, until the first day of May, 1891, keep and supply the said hydrants with an
288 abundant supply of water for fire purposes under such pressure as it now gives; and after said first day of May, 1891, shall supply all of said hydrants, and any hydrants which may be ordered to be set upon additional mains, as hereinafter in this ordinance mentioned, with a pressure equivalent, taking the elevation of the surface of the ground into account, to one hundred and fifteen pounds at the hydrant in front of the Union depot, in said city; Provided, The city shall not be in default with the company upon any of its agreements; and Provided, further, That if, owing to the extension and growth of the city, hydrants shall be ordered upon locations where, owing to the difference in elevation, there shall be less than forty-five pounds pressure, with a pressure of one hundred and fifteen pounds at the hydrant in front of the Union depot, to the number of fifty or more, the said company shall put such hydrants upon a separate high service, and keep and maintain on each of said hydrants a water pressure of not less than fifty pounds.

SEC. 9. The act of God, unavoidable accident, interference of rioters, or other unlawful disturbance, shall excuse any default by the company in the furnishing of any water in this ordinance provided to be furnished for the time being.

SEC. 10. Until the first day of May, 1891, the said city shall pay to The Denver Water Company, its successors and assigns, semi-annually, the sum of money mentioned in said contract between the city and the company of May 9, 1874, in full, for all water furnished to the said city for all purposes mentioned in said contract
289 until the said first day of May, 1891, and during the remainder of the period of twenty years from and after the date of the passage and approval of this ordinance the said city shall pay to the said The Denver Water Company, its successors and assigns, for fire purposes, as follows, viz.:

For the period of ten years from and after the first day of May, 1891, the sum of thirty-five dollars per hydrant per annum for all hydrants then set and in operation, and for the remaining period until the right of purchase shall accrue, as mentioned in section 11 hereof, the sum of twenty-five dollars per hydrant per annum for all hydrants then set and in operation. All payments by the city to be made semi-annually on the first days of May and November in each year during the period aforesaid, at the office of the city treasurer.

SEC. 11. At the expiration of the period of twenty years from and after the date of the passage and approval of the ordinance, in case the city shall then elect so to do, the said works may be purchased by the said city, and in case the parties can not agree, after such election, upon the price to be paid by the city for the water works of the said company, its successors and assigns, then their fair cash value shall be determined by arbitration, by five disinterested persons, none of whom shall be residents of Denver, two of them to be chosen by the city, two by the company, and the fifth by the four first chosen, and in case of failure on the part of the company to name arbitrators for the period of thirty days after the city shall have named arbitrators and notified the company so to do, the city may apply to any court having equity jurisdiction in the
290 county in which the city of Denver shall then be situated for the appointment of two persons of the qualifications aforesaid as such arbitrators, and the court may thereupon appoint two persons, who shall act with the same force and effect as if appointed by the company, and the decision of a majority of said board shall be final and binding upon both parties, and upon the payment, or tender of payment, by said city the said company shall convey to said city all of its property, real or personal, easements, rights and privileges, and thereafter all franchises, rights and privileges which have been at any time theretofore granted said company, its successors or assigns, and which it may then possess, shall cease and be at an end.

SEC. 12. At the expiration of the said period of twenty years the said city may, at its election, renew the contract hereby made, by ordinance to that effect, for a like period of twenty years, but at a price for hydrant rental 10 per cent. less than mentioned in section 10 hereof, for the period remaining after the ten years after May 1st, 1891, and for successive periods of twenty years at the price last aforesaid, as often and as long as the city may choose. This sec-

tion is conditioned, however, upon the full performance by the city of the provisions of section 2 hereof.

SEC. 13. The said company shall at all times after taking effect of this ordinance, whenever so ordered to do by ordinance duly passed, extend its mains upon any street upon which no main shall then be laid, and set fire hydrants thereon, for each of which the city shall pay to the said company, its successors and assigns,
291 the price per hydrant hereinbefore mentioned: Provided, however, that no such extension shall be ordered to be made, nor, if ordered, shall the same be of any binding effect, unless a fire hydrant is ordered for every four hundred feet of extension at least, or fractional part thereof; rent for such hydrants to accrue from and after the date when the city clerk shall be notified that the same are set and ready for use, and that the same rate per hydrant as is hereinbefore mentioned in section 10 hereof; Provided, however, that no such additional hydrants ordered and set before the first day of May, 1891, shall be entitled to any rental except from the said last mentioned date, when the same shall begin to draw rental; and Provided, further, that no main laid by the said The Denver Water Company, after the passage and approval of this ordinance, shall be of less diameter than six inches.

SEC. 14. The said company, its successors and assigns, shall at all times during the existence of this contract, or any renewal thereof, furnish and supply to the city, water free of charge for use in the city hall and fire department houses; also for flushing sewers and gutters and for sprinkling purposes, through special hydrants to be set for that purpose, not exceeding four hundred in number, at such location- as the city council may determine; such last mentioned hydrants to be set and kept in order by the said company, its successors and assigns, and the hydrants purchased from the city under this ordinance may be used for that purpose.

To prevent controversy in regard to the manner and method of using water for the above purposes the same shall be used under rules and regulations to be adopted by the board provided in section 18 hereof.

292 SEC. 15. The fire hydrants provided for in this ordinance shall not be used for any other purpose than for fire purposes and testing; and the opening and closing of said hydrants shall be under the exclusive direction of the chief of the fire department and such persons as he may appoint, and the officers and agents of said company; and the opening and closing of sprinkling hydrants shall be under the direction of such officer as the city may designate; and the city shall be liable for any damage done to the said fire hydrants or said other hydrants by any officer or agent of the city. All fire hydrants and sprinkling hydrants shall be closed when not in actual necessary use and in times of fire the sprinkling hydrants shall not be used in any place to the detriment of the service from the fire hydrants. Nor shall the city suffer or permit undue waste of water from any of said sprinkling hydrants.

SEC. 16. The right of all persons under license from the said company, desiring to excavate the streets to connect with the mains of

said company, under such proper and reasonable rules as now prevail in said city, shall not be inhibited by the said city.

SEC. 17. The said company being charged with a public duty, the said city shall pass such ordinances as will prohibit all unlawful interference with the operations, pollution of its water supply, trespasses upon its property, and unauthorized use of hydrants.

SEC. 18. The said city and the said company shall presently, and on or before the first day of January of each third year, each appoint some competent person, and they two shall choose
293 a third person, to whom all complaints by either party against the other of any violation of the terms of this ordinance and contract, or any controversy as to the construction and meaning of the terms of this ordinance, and the framing, altering or amending rules governing the use of water for flushing sewers and gutters and sprinkling purposes, shall be referred. And the decision of a majority of said board shall be binding on both parties. In case either party shall neglect or refuse at any time to appoint any such arbitrator, and any complaint shall then be pending, the party guilty of such neglect or omission shall be deemed to admit the claim of the other; and in case the said two so chosen shall be unable for fifteen days to agree upon a third person, such third person may be appointed upon application of either party, by any court of general equity jurisdiction in the county in which the said city of Denver shall then be situated. The parties so chosen as above shall hold such positions for the period of three years, and until their successors shall be chosen and qualified.

SEC. 19. This ordinance, when the same shall be in writing accepted by The Denver Water Company, becomes a contract between the city of Denver and the said The Denver Water Company, its successors and assigns, and the same shall as to every provision herein contained as fully bind and inure to the benefit of the successors and assigns of the said The Denver Water Company as to the said company. And it is expressly understood that by the acceptance of this ordinance the said The Denver Water Company loses no rights in regard to the occupation of the streets,
294 alleys and public places, or as to the rights of any other person or persons thereto which it now possesses, but the same are hereby recognized and confirmed and are to be deemed independent of and not merged in any grant in this ordinance elsewhere contained.

SEC. 20. All mains, pipes, valves and other apparatus now owned by said The Denver Water Company, and composing its plant, and all such mains, pipes, valves, hydrants and other apparatus as said The Denver Water Company, its successors or assigns, shall hereafter lay down or set in or upon any of the streets, alleys or other public places within said city shall be and remain the sole and absolute property of said The Denver Water Company, its successors and assigns, and the said The Denver Water Company, its successors or assigns, shall forever be considered and entitled to be in possession thereof, except in case of purchase by said city under the term of this ordinance, or some agreement between said city and

said company, its successors or assigns, when all rights of whatsoever nature of said company, its successors or assigns, in and to the subject-matter hereof shall vest in said city.

SEC. 21. While the consideration for the respective agreements of the city and the company are upon each side the several agreements of the other, all of the several grants, contracts and agreements in this ordinance contained are to be deemed independent agreements with the same force and effect as if each section of this ordinance was contained in a separate ordinance by itself.

295 SEC. 22. This ordinance shall take effect and be in force from and after its passage.

Passed April 10, 1890.

NOTE.—For Schedule A, see pages below.

SCHEDULE A.

Water Rates of the Denver Water Company, 1890.

Schedule of yearly water rates, payable semi-annually in advance, on the first days of May and November of each year, at the office of the company.

Alcohol, each barrel manufactured			$.10
Ale cellar, from	$20.00	to	50.00
Bakery, each oven, from	10.00	to	50.00
Barber shop, first chair			10.00
Barber shop, each additional chair			3.00
Bath, private, with heating apparatus			5.00
Bath, private, without heating apparatus			3.00
Bath, in boarding or tenement house			5.00
Bath, public, not less than			15.00
Beer, for each barrel brewed			.05
Beer house, from	20.00	to	50.00
Billiard saloon, each table			3.00
Boarding house, per room			1.50
But no license less than			10.00
Book bindery, not less than			10.00
Brick work, per thousand			.10
296 Brick yard, each gang of hands			20.00
Camphine, each barrel manufactured			.10
Candle manufactory, from	100.00	to	1,000.00
Candy manufactory, from	15.00	to	75.00
Church	5.00	to	15.00
Church, Baptist, for baptistry	5.00	to	15.00
Cigar manufactory, per hand			2.00
But no license less than			15.00
Club room	30.00	to	100.00
Coffee saloon	15.00	to	30.00
Confectionery	15.00	to	75.00

Cow			1.00
Distillery, for each barrel distilled			.10
Dramshop	25.00	to	100.00
Dyeing and scouring	25.00	to	100.00
Forge			3.00
Fountain for six months, running not more than four hours per day, viz.:			
1 opening 1-16 inch diameter			22.50
1 opening 1-8 inch diameter			40.00
1 opening 3-16 inch diameter			52.50
1 opening 1-4 inch diameter			67.50
1 opening 5-16 inch diameter			82.50
1 opening 3-8 inch diameter			97.50
1 opening 7-16 inch diameter			112.50
1 opening 1-2 inch diameter			150.00
Hall	5.00	to	30.00
Hat manufactory	30.00	to	100.00
Hose, in private stables			3.00
Hose, for private stables, not less than			5.00
297 Hose, for livery or sale stable, not less than			50.00
Hose, for sprinkling sidewalks and washing windows, per foot run			.20
Hotel, per room			1.50
Ice cream saloon, from	15.00	to	50.00
Laboratory	20.00	to	200.00
Laundry	20.00	to	300.00
Livery stable, per stall			2.00
Malting, per bushel			.01
Office	5.00	to	30.00
Oyster saloon	15.00	to	30.00
Packing house	40.00	to	500.00
Photograph gallery	20.00	to	40.00
Plastering, per square yard			.01½
Porter cellar	20.00	to	50.00
Rectifying whiskey, per barrel			.03
Residence occupied by one family only—			
1 to 4 rooms			5.00
5 or 6 rooms			6.00
7 or 8 rooms			7.00
9 or 10 rooms			8.00
11 or 12 rooms			9.00
13 or 14 rooms			10.00
15 or 16 rooms			11.00
17 or 18 rooms			12.00
19 or 20 rooms			13.00
of 10 or more rooms used as a boarding house, per room			1.50
Sale stable, per stall			2.00
298 School, for every scholar			.20
Shop from	5.00	to	30.00

Slaughter house	25.00	to	500.00
Soap manufactory	100.00	to	1,000.00
Soda manufactory	40.00	to	300.00
Spirit gas, for each barrel manufactured			.10
Sprinkling street, for that portion of street embraced between two cross streets			15.00
Sprinkling street with hose, including sidewalks, per foot run			.20
Starch manufactory	50.00	to	200.00
Steam boilers, per square foot of fire surface, not less than			.40
But no license less than			25.00
Stock yard	25.00	to	500.00
Stone work, per perch			.05
Store	10.00	to	300.00
Sugar refinery	300.00	to	3,000.00
Tannery, per vat			6.00
But no license less than			25.00
Tenement, per room			1.50
But no license less than			10.00
Tobacco manufactory, per hand			2.00
But no license less than			15.00
Urinal basin	10.00	to	40.00
Vault, for residence			5.00
Vault, accommodating double house, each house.			3.00
Vault for tenement or boarding house, for every 15 room			5.00
299 Vault, bar			5.00
Vehicle	.00	to	2.00
Vinegar, for each barrel manufactured			.05
Washing bottles	5.00	to	20.00
Washing barrels, per barrel			.05
Washing meat	50.00	to	500.00
Water closet, private			5.00
Water closet, hotel			10.00
Wine cellar	20.00	to	50.00
Restaurant	25.00	to	100.00

Special Rates Adopted by this Company.

Irrigation of lots only through hose, with nozzle 40 cents per front foot. No license for irrigation will be issued for less than the season rate. Water for irrigation must not be used except within the hours specified on the license, nor during a fire or conflagration. Any violation of this rule will subject the license to forfeiture.

For fountain in drug store, six months, opening not to exceed ⅛ inch in diameter	$50.00
For tumbler washer in drug store, six months	50.00

Water used for elevators, motors or manufacturing purposes at the following rates, payable monthly:

When the quantity used per day is from 1,000 to 5,000 gallons, per 1,000 gallons	$.20
5,000 to 25,000 gallons per day, per 1,000 gallons	.15
Provided that the rate for any month shall not be less than	6.00

300 Where water is paid for all purposes on premises there will be no additional charge for a standpipe for fire protection. Where The Denver Water Company's water is not used a special rate will be made for such standpipes.

The water company reserves the right to require any customer to furnish a meter and pay for water by meter measurement. In any case before a meter is placed a satisfactory rate must be established or agreed upon.

Approved April 10, 1890.

301 "EXHIBIT B."

Ordinance No. 163. *Series* 1907.

Aldermanic Bill No. 110.

Introduced by Ald. Bush.

A bill for an ordinance authorizing and empowering the City and County of Denver to enter into a contract with The Denver Union Water Company, whereby said company shall agree that the City and County of Denver may purchase the property of said company under an appraisement to be made in accordance with Section 11, of ordinance No. 44, of the Series of 1890, before the arrival of the time fixed therefor in said contract, and authorizing the appointment of appraisers by a committee composed of the mayor, the president of the board of supervisors and the president of the board of aldermen in accordance with the provision for an appraisement of said property in the manner provided for in said Section 11 of Ordinance No. 44 of the Series of 1890, and to determine the fair and reasonable value of the water plant of said The Denver Union Water Company, and the corporations and persons used by said The Denver Union Water Company in supplying water to the City and County of Denver and to the inhabitants of the said City and County of Denver, and prescribing the manner of executing and carrying out such contract.

Whereas, on April 10th, 1890, a contract was made and entered into between the City of Denver and The Denver Water Company, contained and set forth in Ordinance No. 44 of the Series of 1890, which was duly enacted, granting The Denver Water Company the right of laying down, continuing and maintaining water
302 pipes, valves, hydrants and apparatus for the conveyance and distribution of water through the streets, alleys, and public

places of said city, for the use of said city, and the inhabitants thereof; and

Whereas, in and by said contract so contained in said ordinance, it is provided in Section 11 thereof, that:

"At the expiration of the period of twenty years from and after the date of the passage and approval of the ordinance, in case the city shall then elect so to do, the said works may be purchased by the said city, and in case the parties cannot agree, after such election, upon the price to be paid by the city for the water works of the said company, its successors and assigns, then their fair cash value shall be determined by arbitration, by five disinterested persons, none of whom shall be residents of Denver, two of them to be chosen by the City, two by the company, and the fifth by the four first chosen, and in case of failure on the part of the company to name arbitrators for the period of thirty days after the city shall have named arbitrators and notified the company so to do, the city may apply to any court having equity jurisdiction in the county in which the City of Denver shall then be situated for the appointment of two persons of the qualifications aforesaid as such arbitrators, and the court may thereupon appoint two such persons, who shall act with the same force and effect as if appointed by the company, and the decision
303 of a majority of said board shall be final and binding upon both parties, and upon the payment, or tender of payment, by said city the said company shall convey to said city all of its property, real or personal, easements, rights and privileges and thereafter all franchises, rights and privileges which have been at any time theretofore granted said company, its successors or assigns, and which it may then possess, shall cease and be at an end."

And Whereas, The Denver Union Water Company has become the owner of the properties and franchises of the said The Denver Water Company, and is at the present time its successor in and the holder of the said contract set forth and contained in said Ordinance No. 44 of the Series of 1890, aforesaid; and,

Whereas, Section 5 of the Ordinance No. 44 of the Series of 1890, provides that:

"The rate to private consumers for water shall not be greater than now charged by the said The Denver Water Company, a schedule of which rates is hereto annexed marked Schedule A, and the said The Denver Water Company may require any consumer to furnish a meter and pay for water by meter measurement; Provided, however, That, at any time after five years from date, the city council may require said company to fix schedule rates for private consumers equivalent to the average rates prevailing in the cities of
304 Chicago, St. Louis and Cincinnati for the same service."

And, Whereas, it has been deemed desirable that efforts should be made by and on behalf of the City and County of Denver to purchase the water plant and property owned and used by The Denver Union Water Company in supplying water to the City and County of Denver and the inhabitants thereof, in accordance with the terms and provisions of the said contract of April 10, 1890, and upon a valuation thereof fixed by disinterested appraisers selected in accordance with the terms of said contract; and

Whereas, the Mayor of the City and County of Denver, at the request of the members of the Council of the City and County of Denver, entered upon negotiations with The Denver Union Water Company for the purpose of ascertaining whether or not said appraisement might be made and said purchase effected before the time fixed in and by the terms of said contract—the said The Denver Union Water Company waiving the right to insist that said purchase could not be made under the terms of said contract until after the expiration of the period fixed therefor in the paragraph thereof, hereinbefore quoted; and,

Whereas, a correspondence was conducted between the said Mayor of the City and County of Denver and the said The Denver Union Water Company, copies of which have been heretofore transmitted to the Council of the City and County of Denver, and considered by said Council; and,

Whereas, said The Denver Union Water Company has an abundant supply of water at all seasons of the year for the present
305 and future needs of the City and County of Denver and its inhabitants, but admits that from time to time additions must be made to the conduits and pipes used in conducting and distributing said supply, and that in view of the shortness of the time which will elapse before the appraisers are to be appointed under and in accordance with the terms of the contract of April 10, 1890, the said The Denver Union Water Company is unwilling to expend large sums of money in building pipes and conduit lines for use in the future and after the arrival of the time when the said City and County will have the right to purchase said plant under appraisement, in view of the existing uncertainty as to whether the City will exercise its right and option to purchase said plant at said time; and,

Whereas, as a result of said investigation, negotiations and inquiries made and conducted by the City and County of Denver, it has become apparent to said City that a delay in the appointment of said appraisers for more than two and one-half years, as provided by the terms of said contract, would be to the detriment of the City and County of Denver and its inhabitants, would produce an unsettled condition of affairs with reference to said purchase, causing financial loss to said corporation, and that it is desirable and will be of advantage to the City and County of Denver and the inhabitants thereof that there should be, as speedily as it may be had, an appraisement under said contract and a determination of whether the City will purchase the property owned and used by said The Denver Union Water Company in supplying water to the City and County of Denver and the inhabitants thereof; and,

306 Whereas, the City and County of Denver has obtained from said The Denver Union Water Company its consent to waive the period of time fixed and set forth in Section 11 of said contract and ordinance, and to agree to proceed in conjunction with the City and County of Denver in accordance with the terms of said contract to the appointment of said appraisers at the present time, and to permit the City and County of Denver to purchase said prop-

erty upon an appraisement and in accordance with the terms and conditions of said contract and ordinance without awaiting the expiration of the period fixed therefor in and by the terms of said contract and ordinance; and,

Whereas, in connection therewith, the City and County of Denver has exacted and required of and from the said The Denver Union Water Company an agreement that the said The Denver Union Water Company will submit to the City Council of the City and County of Denver, and through it to the electors of the City and County of Denver, qualified to vote thereon, a proposition for a new contract, plainly specifying, setting forth and containing what rates for water furnished to private consumers shall be charged during said period and the rates and terms upon which it will supply to the City and County of Denver for its uses and for fire hydrant rentals for said period of twenty years, within ninety days from and after the passage of this ordinance, said rates to be ascertained and fixed for said submission by the arbitrators selected to appraise the property of said company as hereinafter set forth; so that both of said propositions, to-wit:

1st. Shall the City and County of Denver purchase the property so owned and used by The Denver Union Water Company
307 and such allied and auxiliary corporations, persons or associates as may hold the legal title thereto, now engaged in furnishing the City and County of Denver and its inhabitants with water, at a price to be ascertained and fixed by said appraisers to be appointed in the manner provided for and with the qualifications set forth in said Section 11 of said ordinance?

2nd. Shall the people of Denver make a contract for a period of twenty years with rates for water to be furnished to the City and County of Denver, and to the private consumers of water therein, plainly, specifically and unmistakably set forth and ascertained by appraisers as hereinafter set forth? shall be submitted at the same election to the electors qualified to vote thereon (?)

So that the said electors of the City and County of Denver, so qualified to vote thereon, shall have the choice and opportunity of determining which of said propositions they may desire to accept; and the said City and County of Denver having also obtained from said The Denver Union Water Company the assurance and agreement that it will agree with the said the City and County of Denver to put in force an arrangement and agreement fixing temporary rates to be paid said The Denver Union Water Company by the private consumers of the City and County of Denver, to be charged and collected from and after the first day of November, A. D. 1907, and for the remainder of the term of the present contract, in the event that the City and County of Dennver shall not, at said election hereinabove referred to, determine to purchase said plant or to extend or renew said contract for a further period of twenty years; and,

308 Whereas, it is the judgment of the Council of the City and County of Denver, under the circumstances above narrated, that it is advantageous to said City to proceed forthwith to an

acceptance of said agreement of the said The Denver Union Water Company and to the appointment of appraisers as provided in Section 11 of said contract of April 10, 1890, and to accept the proposition of said The Denver Union Water Company to waive the time limit therein specified, and that in this determination and conclusion the City Council of the City and County of Denver is fortified by the fact that the contracts between The Denver Union Water Company and certain municipalities now incorporated in and made a part of the City and County of Denver require adjustment, the former town of Highlands and the former town of Globeville, now both embraced within the limits of the City and County of Denver;

Now, Therefore, Be it Enacted by the Council of the City and County of Denver:

SECTION 1. In consideration of the premises and the mutual covenants and agreements hereinafter set forth and in further consideration of Five ($5.00) Dollars in hand paid by The Denver Union Water Company to the City and County of Denver, the receipt whereof is hereby acknowledged and confessed, the City and County of Denver, party of the first part, and the said The Denver Union Water Company, a corporation organized and existing under the laws of the State of Colorado, party of the second part, hereby mutually covenant and agree to and with each other as follows, to-wit:

1. It is hereby agreed that five (5) disinterested persons, none of whom shall be residents of the City and County of Den-
309 ver, shall be appointed to appraise the value of the plant and property of the said Company, two of them to be chosen by the City and County of Denver through a committee herein named and authorized to make such selection, two by The Denver Union Water Company, and the fifth by the four first chosen as herein provided, the said appraisers to be selected by the City and County of Denver, to be named by said committee composed of the Mayor of the said City and County of Denver, the President of the Board of Supervisors and the President of the Board of Aldermen of the City and County of Denver; and said Mayor, President of the Board of Supervisors and President of the Board of Aldermen are hereby authorized to make said appointments, and in the event that all three may not agree, then two thereof are hereby authorized and empowered to select such appraisers and to take such steps and legal action as may be necessary for that purpose; said selection or said appointment of said appraisers by The Denver Union Water Company and the City and County of Denver in the manner herein provided, to be made within thirty (30) days after the execution of this contract, and that the fifth of said appraisers shall be selected by the first four members selected as herein provided, within thirty (30) days after the appointment of said four appraisers.

2. It is further hereby agreed and provided that such appraisers and arbitrators, so selected as herein provided, after their selection and appointment and before proceeding to hear or determine the matters submitted to them, shall take and subscribe an oath before some person duly authorized by law to administer oaths, to the

effect severally that they will well, truly and impartially dis-
310 charge their duty as such appraisers and arbitrators and all the matters and things submitted to them under this agreement to the best of their ability.

3. It is further hereby agreed and provided that the decision of any three of said appraisers shall be binding as to the questions submitted to them for determination under this agreement.

4. It is further hereby agreed that said appraisers and arbitrators shall view the premises and examine the property affected by and to be appraised under this agreement and shall hear such evidence and make such inquiries with reference thereto as may enable them properly to understand their duty, and after having so done and having heard such matters as shall be brought to their attention by the parties hereto, respectively, and such other evidence as they may determine to consider affecting the value of the premises and property belonging to or used by The Denver Union Water Company, or any of its allied and auxiliary corporations or associations or persons connected with it, engaged in or assisting in the business of supplying the City and County of Denver and its inhabitants with water, and after hearing arguments by the respective representatives of the parties hereto, relating thereto and after due consideration of the same, shall determine and fix the fair cash value of the property, business and rights so owned or used by The Denver Union Water Company, party of the second part, its allied and auxiliary corporations and associations and persons connected with it aforesaid, by which said company at the present time supplies water to the said City and County of Denver, party of the first part, and
311 its inhabitants, or to anyone else at any place whatever, for domestic, manufacturing, or irrigating purposes and which shall constitute and include all the property, rights and privileges of every kind and nature whatsoever acquired by said party of the second part from its predecessor, The Denver Water Company, or from any person or corporation whatsoever, whether the legal title be held by said The Denver Union Water Company or by some other person; and also all property, real or personal, easements, rights and privileges and contracts of every and all nature and kind whatsoever acquired by said party of the second part, its allied and auxiliary corporations or associations or persons connected with it, since their respective incorporations, which are in any way connected with or relate to said water plant of said The Denver Union Water Company, or held by its allied or auxiliary corporations or associations or persons connected with it, or necessary or useful for its protection, maintenance and operation; and also separately ascertain the fair cash value of all that portion of said pipes, pumps, hydrants, mains and valves now used by The Denver Union Water Company, party of the second part, its allied and auxiliary corporations or associations and persons connected with it, owned by the City and County of Denver, party of the first part.

5. It is further hereby agreed that upon the appointment of said appraisers and arbitrators as so provided, they shall with all convenient speed and dispatch proceed to the hearing and determina-

tion of the matters set forth in Section 4 hereof, and shall thereupon make a full and complete report of their determination in writing, signed by said appraisers, or in the event their determina-
312 tions are not unanimous, by a majority thereof, one copy to be submitted to the Mayor and Council of the City and County of Denver, party of the first part, and one copy to The Denver Union Water Company, party of the second part; and thereafter and as soon as may be by proper procedure in accordance with law, there shall be submitted to the electors of the City and County of Denver to vote thereon, the question of whether the City and County of Denver shall purchase of The Denver Union Water Company, its allied and auxiliary corporations and associations and persons connected with it, their successors or assigns, the property referred to and described in Section 4 hereof, at and for the price fixed by said Board of Appraisers and Arbitrators proceeding as aforesaid; and also at the same time, to the electors qualified to vote thereon, the question as to whether a contract or franchise shall be granted to The Denver Union Water Company, party of the second part, its successors and assigns, to supply water to the City and County of Denver and its inhabitants upon the schedule, terms and conditions and for the rates set forth in a proposition to be made by the said The Denver Union Water Company, party of the second part, as provided herein, with rates in said contract to be definitely fixed and easily and plainly understood, and to be ascertained and fixed by said Arbitrators herein provided for, and which shall be fair, just and reasonable rates for the water supplied and services performed and give to said Company fair, just and reasonable returns upon a fair and reasonable valuation of its property, and to cover a period of twenty (20) years from and after the date of said election; and it is further distinctly understood and agreed
313 that The Denver Union Water Company, in said proposal for a new contract for said period of twenty (20) years, agrees to provide for the purchase for cash from the City and County of Denver of all the mains, pipes, pumps, hydrants and valves now used by the said The Denver Union Water Company, its allied or auxiliary corporations or associations, in furnishing the City and County of Denver or its inhabitants with water, and which is now owned by said City and County of Denver, at and for the price to be fixed thereon by the appraisers and arbitrators herein provided for and who are to appraise and determine the value of said property for said purpose.

6. It is hereby further agreed that if at such election so to be held as herein provided, the electors qualified to vote thereon shall refuse to accept the proposition of the said party of the first part for a new contract with rates therein specified as herein provided, and the qualified electors to vote thereon shall accept the said proposition with reference to the purchase of said plant and property at the valuation fixed by said appraisers and arbitrators as herein provided, then the said The Denver Union Water Company, party of the second part, hereby covenants and agrees that it will, upon the payment of the price so fixed by said appraisers, either in money or in

the bonds of the City and County of Denver lawfully issued therefor bearing interest at the rate of four (4 per cent) per cent. per annum, convey, transfer and deliver to said City and County of Denver all of its said water plant and property, real and personal, with all the easements, rights and privileges, and all the property, real or personal, easements, rights and privileges of whatever
314 kind or nature, belonging to its allied and auxiliary corporations and associations or persons connected with it, used in connection with the business of supplying water to the City and County of Denver and its inhabitants, and being the said property referred to in Section 4 hereof; and that from and after said transfer and the payment and delivery thereof to The Denver Union Water Company of said price therefor in cash or in said bonds of the City and County of Denver, as herein provided, all franchises, rights and privileges which have at any time theretofore been granted to the said The Denver Union Water Company or its successors and assigns by the City and County of Denver, or any of its component municipalities, or which have been transferred to said The Denver Union Water Company, or to any of its successors and assigns, and its allied and auxiliary corporations or associations, and which it shall then possess, shall then be at an end without further action or determination of the same.

7. It is further hereby agreed that if at said election so to be held as herein provided, the electors qualified to vote upon said proposition shall refuse by their majority vote to accept the proposition of said The Denver Union Water Company and its allied and auxiliary corporations or associations, to purchase said water plant, but shall vote to grant a new contract to The Denver Union Water Company, specifying the rates therein to be charged in the manner herein provided, then said party of the second part, its successors and assigns, shall receive from the City and County of Denver a franchise or contract containing the terms provided for therein for a period of twenty (20) years from the date of said election.

315 8. It is further hereby agreed that if at said election as herein provided, and which it is understood and agreed and is provided hereby shall be a special election called for considering said two propositions, the electors qualified to vote thereon shall, by their majority vote, refuse to accept either the proposition as to the purchase of said property or as to the granting of a new contract, the action of the said parties hereto in entering into this agreement and in submitting said matters to the vote of the electors qualified to vote thereon as herein provided, shall not constitute a waiver of the rights or privileges of either party hereto or prejudice in any manner or form or to any extent whatever the rights and privileges of the City and County of Denver, party of the first part, or The Denver Union Water Company, party of the second part, under and by virtue of the provisions, or any of them, of the said contract of April 10, 1890, being said Ordinance No. 44 of the Series of 1890, all the rights, privileges and franchises of either party hereunto provided for or contained in and by the terms of said contract and ordinance shall be and remain in full force and effect the same

as if this contract and agreement had not been entered into and none of the proceedings herein provided for had been taken.

9. It is further hereby agreed that in case either of the parties named as appraisers and arbitrators by the party of the first part shall die, fail or refuse to become unable to act as such appraiser and arbitrator before the final determination of the matters herein involved, then the Mayor of the City and County of Denver is hereby authorized to forthwith thereafter name and appoint some other person, having the qualifications hereinbefore set forth,
316 to be an appraiser and arbitrator in the stead and place of the one before appointed and unable and failing to act as herein provided; and so, in like manner, in case of either of the persons appointed as appraisers and arbitrators by the party of the second part shall die or refuse or become unable to act as such appraiser and arbitrator before the matters herein referred to are settled and the appraisement and arbitration shall be determined, then the party of the second part is hereby authorized and empowered in the same manner as in the first instance to forthwith thereafter appoint some person, having the qualifications hereinbefore set forth, to act in the place and stead of the one theretofore appointed but being unable to act; and so, in like manner, in case the person appointed by the four other appraisers, as the fifth appraiser, shall die or refuse or fail or become unable to act as appraiser and arbitrator as herein provided, before all the matters referred to above are determined, then the four persons then acting as arbitrators and appraisers shall forthwith thereafter appoint a person having the qualifications aforesaid, as appraiser and arbitrator in the place and stead of the one theretofore appointed and whose death, failure or refusal to act has prevented him from participating in such appraisement, and said fifth appraiser as appointed shall have the same authority and power as was conferred upon the person theretofore appointed.

10. It is further hereby agreed that all costs and expenses incurred by reason of the appraisement, arbitration and special election hereby had and made under this agreement and under the terms and provisions of said contract, shall be borne by the parties hereto equally.

317 11. It is further hereby agreed that the parties hereto respectively shall produce before said appraisers and arbitrators while considering said matters, all books, deeds, papers, accounts, vouchers, writings and documents within their possession or under their control or under the control or in the possession of their allied corporations and associations or any person connected with them, which the said Board of Appraisers and Arbitrators may require, call for or request, bearing upon and properly relating to the matters submitted to said appraisers and arbitrators for consideration, and said appraisers and arbitrators may require and call for and request said matters and things from time to time as in their judgment they may deem desirable.

12. It is hereby further agreed that said appraisers and arbitrators shall be at liberty to and are hereby authorized and empow-

ered to proceed, without the party or parties failing to attend before them, in case of the non-attendance of the parties to this agreement, or any of them, or any of the witnesses or representatives of the parties to this agreement, or any of them, or in case of the failure on the part of said parties, or either of them, to produce any books, deeds, papers, accounts, vouchers, writings, or other documents within their possession or under their control or under the control of their allied or auxiliary corporations or associations, or any person connected with them, which the said board of appraisers and arbitrators shall call for or request, after three (3) days' previous notice in writing, under the hands of the members of said board given to the said parties or witnesses and their designated representatives notifying them to produce such books, deeds, vouch-
318 ers, papers, accounts, writings or other documents, and of the time and place where the same are to be produced.

13. It is hereby agreed and provided that the said respective parties hereto shall each pay the appraisers named by them, and shall share and pay equally the amount of the fifth appraiser as herein provided for.

It is hereby agreed that the said appraisers and arbitrators shall have the power if in their opinion it shall be necessary to employ an accountant to assist them, and that all other necessary aid and assistance required by said appraisers and arbitrators shall be furnished by and at the expense of the parties of the first and second parts hereto.

In witness whereof, the party of the first part has caused these presents to be signed by its Mayor, attested by its Clerk, and its corporate seal to be hereunto affixed, and the party of the second part, being duly and legally authorized thereunto, has caused these presents to be signed by its President, attested by its Secretary, and its corporate seal to be hereunto affixed this — day of ——, A. D. 1907.

SECTION 2. The Mayor of the City and County of Denver is hereby authorized, empowered and directed to subscribe said agreement herein adopted and hereinbefore set forth in Section one (1) hereof, and the City Clerk of the City and County of Denver is hereby authorized, empowered and directed to attest such act of said Mayor and to affix to said contract the seal of the City and County of Denver, and the Auditor of the City and County of Denver is hereby authorized, empowered and directed to countersign and register said contract.

319 SECTION 3. The Mayor of said City and County of Denver, the President of the Board of Supervisors and the President of the Board of Aldermen are hereby named, constituted and appointed a committee of three and are hereby authorized, empowered and directed to name and appoint the appraisers and arbitrators provided for in said agreement and set forth in Section one (1) hereof to be appointed and named by the said the City and County of Denver.

SECTION 4. The Denver Union Water Company within ten days after the passage and publication of this ordinance shall sign and

subscribe said contract and agreement herein recited, and adopted and set forth in Section one (1) hereof, and upon its failure so to do this ordinance and contract shall become null and void.

JOHN CONLON,
President of the Board of Aldermen.
A. J. SPENGEL,
President of the Board of Supervisors.

Signed and approved by me this 2nd day of October, A. D. 1907.
R. W. SPEER, *Mayor.*

Attested by the undersigned with the corporate seal of the City and County of Denver.
[SEAL.]
E. E. SOMMERS,
Clerk of the City and County of Denver.

320 "EXHIBIT C."

(*Charter Amendment Section* 264A.)

SECTION 264-*a*. Nothing in the preceding sections or in this charter, except as herein specifically provided, shall apply to the acquisition or operation of a water works or supplying the City and County of Denver and its inhabitants with water for all uses and purposes, but a public utilities commission is hereby created, to consist of three members, to have complete charge and control thereof, and to have and exercise all the powers given to the board of public works in Chapter IX, as to all public utilities. Except as herein provided, each member of said commission shall be elected for a term of six years and shall serve until his successor is elected and qualifies, and his salary shall be four thousand dollars per annum, payable in equal monthly installments by the treasurer out of the general fund upon the warrant of the commission, and Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows are hereby elected as the first members of said commission to serve, in the order named, from the date of their election to June 1, 1912, June 1, 1914, and June 1, 1916, respectively, and until their successors are elected and qualify. The names of all candidates hereafter nominated for members of said Commission shall appear on the official ballot without any party designation in connection therewith. Each commissioner shall give bond in the sum of $10,000 in the manner provided in section 152 of the charter. Said commission shall have power to employ a secretary and such legal and technical help as it may deem necessary, and shall, subject to the civil service pro-
321 visions of this charter, hire all other employès, and shall fix and pay all salaries and wages and shall fix and collect all rates and charges for any service under its control, which rates and charges shall be made as low as good service will permit. Said commission may adopt reasonable rules and regulations with reference to such service. It shall make an itemized monthly statement

of all moneys received and paid out by it, a copy of which it shall file with the city auditor, and shall daily turn over to the city treasurer, as provided in section 260, the money received by it, said money to be paid out by the treasurer only upon the warrant of said commission. Said commission shall have and exercise all the powers of the city and county granted in the constitution or named in the charter in the matter of constructing, purchasing, condemning and purchasing, acquiring, leasing, adding to, maintaining, conducting and operating a water plant or system for all uses and purposes and everything pertaining or deemed necessary or incidental thereto. It shall institute and defend all litigation affecting its duties and powers or in relation to its trusts and all expenses thereof shall be paid by the treasurer out of the general fund upon the warrant of the commission, and it may also call to its assistance the city attorney or any other department of the city government. Except as in this section provided, the city and county shall never purchase or acquire or exercise any option, right, privilege or power of purchasing or acquiring any water plant or system from any person, persons or corporation except upon a vote of the qualified electors first had and obtained authorizing the same, and wherever in any ordi-
322 nance or contract the former City of Denver was given the right, or the city and county now has the privilege or power to purchase or acquire any water system or plant or to extend any contract with reference thereto, the term "city" used in any such ordinance or contract shall be taken and held to mean the qualified electors of the city and county and not otherwise. No plant owned, acquired or constructed by the city and county and no water rights owned or acquired by the city and county shall ever be sold, leased or otherwise disposed of except upon a vote of the qualified electors first had and obtained, and the same shall be under the sole control and management of said commission. Any member of said commission may be recalled and his successor named at any time in the manner provided by the recall section of this charter. Any vacancy shall be filled by the remaining members of the commission and such appointee shall serve until the next municipal election and until his successor is elected and qualifies. Upon a vote of the taxpaying electors authorizing the same, as hereinafter provided, the City and County of Denver shall and it does hereby authorize the creation of an indebtedness in the sum of eight million dollars to provide a municipal water plant or system and everything incidental or necessary thereto for supplying the city and county and its inhabitants with water for all uses and purposes, said indebtedness to be evidenced by its bonds of the par value of eight million dollars, in convenient denominations of not more than one thousand dollars each and bearing four and one-half per centum interest per annum of such date and in such form and maturing at such times as
323 may be prescribed by said commission. The council shall pass such ordinances as said commission may deem necessary respecting the issuance of said bonds or to the full exercise of all the powers given it, in the form recommended by the commission, and without amendment, and the mayor shall sign the same. Said commission shall issue said bonds only from time to time as they

are required for actual use or sale, and the mayor shall sign them and the clerk shall sign and attest them under the seal of the city and the auditor shall register them, with the approval of the president of said commission endorsed thereon. No such bonds shall be used or sold at less than par, nor sold except after advertisement as in this charter provided for the sale of public improvement bonds, and they may be called for redemption and redeemed by the commission in like manner as provided in section 314. If The Denver Union Water Company shall place in escrow with the Continental Trust Company of Denver, on or before July 1, 1910, a good and sufficient deed of conveyance from said water company to the City and County of Denver for all the property of every description included and embraced in the appraisement made under Ordinance 163, series of 1907, free and clear of all liens, encumbrances, claims and demands of every kind and character, accompanied by a valid surrender and release of any and all rights, claims and demands said company or any of its subsidiary, associated or affiliated companies may have against the city and county or against any of said property, with direction in writing to deliver the same to said commission in exchange for seven million dollars of said bonds at par, then the commission shall file its acceptance with said trust company
324 and the same shall constitute a binding contract of purchase.

In that event then at a special election which the council shall call within sixty days after the adoption of this amendment, to be held on the first Tuesday in September, 1910, there shall be submitted to the qualified taxpaying electors the question of issuing the said eight million dollars in bonds, of which seven million dollars at par shall be delivered to said trust company as aforesaid and the other one million dollars of bonds, or so much thereof as may be deemed necessary, shall be sold or used by the commission to improve, repair and add to the water plant so purchased. The ballot shall have printed on it the words "For the issuance of Eight Million Dollars in bonds for the Purchase and Repair of the existing Water Plant under the provisions of section 264-*a* of the Charter," and on a separate line the words, "Against the issuance of Eight Million Dollars in bonds for the Purchase and Repair of the existing Water Plant under the provisions of section 264-*a* of the Charter," with a space opposite each such line in which the voter may make his mark indicating his vote. In case The Denver Union Water Company shall fail or refuse to fully comply with all the foregoing provisions as to the things to be done and performed by it, then at the special election aforesaid in lieu of the foregoing question, there shall be submitted to the qualified taxpaying electors on the ballot the question of issuing eight million dollars in bonds to be sold or used to construct and put into operation a complete system of water works for supplying said city and county and the inhabitants thereof with water for all uses and purposes. Said
325 ballot shall have printed on it the words, "For the issuance of Eight Million Dollars in bonds for the Construction of a new Municipal Water Plant," and on a separate line the words, "Against the Issuance of Eight Million Dollars in bonds for the

Construction of a new Municipal Water Plant," with a space opposite each such line in which the voter may make his mark indicating his vote. Such bonds, or so much thereof as the commission may deem necessary, shall be sold or used, by it to construct and put into operation a complete system of water works for supplying said city and county and its inhabitants with water for all uses and purposes, and said commission shall forthwith proceed to construct the same. The said commission shall, immediately upon its election, in case The Denver Union Water Company has not accepted the seven million dollars in bonds for its plant as aforesaid, proceed to make a careful investigation of the value of said plant for the uses and purposes of the City and County of Denver and its inhabitants, and also proceed to make a careful estimate of the cost of constructing a complete new water system for the City and County of Denver and the inhabitants thereof and may submit an alternative bond proposition at said special election for the issuance of bonds in such sum as it may deem advisable for the acquisition or construction of a water plant or any part thereof by any of the ways within its powers herein mentioned, and the same shall be placed on said ballot in such form as said commission may determine, and it may also submit any proposition concerning its powers or trust at any municipal election in like manner. If a majority of the votes cast thereon shall
326 be in favor of any proposition submitted it shall thereby be adopted, and in case alternative propositions are submitted and each receive a majority, then the one receiving the greater affirmative vote shall be the one adopted. Such adoption shall be a sufficient authorization for the issuance of the bonds thereby provided for and the same, when issued, shall be and constitute an indebtedness of the City and County of Denver for the purposes aforesaid, and the provisions in this section relative to the issue, sale and redemption of bonds shall apply thereto. Any provision of the charter in conflict herewith is hereby repealed.

327 "EXHIBIT D."

Ordinance No. 98, Series 1910.

Supervisors' Bill No. 46.

Introduced by Supervisor McGauran.

A bill for an ordinance calling a special election to be held on the first Tuesday in September, 1910, at which election—in the event that The Denver Union Water Company shall have placed in escrow with the Continental Trust Company of Denver on or before July 1, 1910, a good and sufficient deed of conveyance from said Water Company to the City and County of Denver for all the property of every description included and embraced in the appraisement made under Ordinance 163, series of 1907, free and clear of all liens, encumbrances, claims and demands of every kind and character, accompanied by a valid surrender and release of any and all rights,

claims and demands said company or any of its subsidiary, associated or affiliated companies may have against the City and County or against any of said property, with direction in writing to deliver the same to the public utilities commission in exchange for seven million dollars in bonds of the City and County of Denver at par, as authorized in section 264-*a* of the charter of said city, and the said public utilities commission shall have filed its acceptance with said trust company—there shall be submitted to the qualified taxpaying electors of said City and County the question of issuing eight million dollars in bonds of the character described in said section 264-*a*, of which seven million dollars at par shall be delivered to said trust company as aforesaid, and the other one million dollars of bonds or so much thereof as may be deemed necessary shall be sold or used by the said commission to improve, repair and add to the water plant so purchased; and in case The Denver Union Water Company shall have failed or refused on or before July 1, 1910, to comply fully with all the foregoing provisions as to the things to be done and performed by it, then at the special election aforesaid in lieu of the foregoing question there shall be submitted to the qualified taxpaying electors on the ballot the question of issuing eight million dollars in bonds to be sold or used to construct and put into operation a complete system of water works for supplying said City and County of Denver and the inhabitants thereof with water for all uses and purposes; also, providing for the form of submission of either of said questions upon the ballot; also providing for the discharge of their duties severally by all officials charged by law with any duty, relating to such special election; also providing for the submission at such special election upon the certificate of the public utilities commission of an alternative bond proposition for the issuance of bonds in such sum as it may deem advisable for the acquisition or construction of a water plant or any part thereof, by any of the ways within its powers mentioned in said section 264-*a*, and placing the same upon the ballot in such form as said commission may determine.

328

Be it Enacted by the Council of the City and County of Denver:

SECTION 1. That there be and is hereby called, pursuant to the provisions of section 264-*a* of the Charter of the City and County of Denver a special election, to be held on the first Tuesday of September, 1910, in the City and County of Denver, at which election there shall be submitted to the qualified taxpaying electors of said City and County the questions hereinafter set forth.

329

SECTION 2. If The Denver Union Water Company shall have placed in escrow with The Continental Trust Company of Denver, on or before July 1, 1910, a good and sufficient deed of conveyance from said Water Company to the City and County of Denver for all the property of every description included and embraced in the appraisement made under Ordinance 163, series 1907, free and clear of all liens, encumbrances, claims and demands of every kind and character, accompanied by a valid surrender and release of any and

all rights, claims and demands said Company or any of its subsidiary, associated or affiliated companies may have against the City and County or against any of said property, with direction in writing to deliver the same to said Commission in exchange for seven million dollars of bonds at par of the character described in said section 264-*a* of the Charter, and the Commission shall have filed its acceptance with said Trust Company—then and in that event, at such special election hereby called and so to be held as aforesaid, there shall be submitted to the qualified taxpaying electors the question of issuing the said eight million dollars in bonds, of which seven million dollars at par shall be delivered to said Trust Company as aforesaid and the other one million dollars of bonds, or so much thereof as may be deemed necessary, shall be sold or used by the Commission to improve, repair and add to the water plant so purchased. The ballot shall have printed on it the words, "For the issuance of Eight Million Dollars in bonds for the Purchase and Repair of the existing Water Plant under the provisions of section 264-*a* of the Charter," and on a separate line the words, "Against the issuance of Eight Million Dollars in bonds for the Purchase and Repair of the existing Water Plant under the provisions of section 264-*a* of the Charter," with a space opposite each such line in which the voter may make his mark indicating his vote.

SECTION 3. In case The Denver Union Water Company shall fail or refuse to fully comply with all the foregoing provisions as to the things to be done and performed by it, then at the special election aforesaid, in lieu of the foregoing questions, there shall be submitted to the qualified taxpaying electors on the ballot the question of issuing eight million dollars in bonds to be sold or used to construct and put into operation a complete system of water works for supplying said City and County and the inhabitants thereof with water for all uses and purposes. Said ballot shall have printed on it the words, "For the issuance of Eight Million Dollars in bonds for the Construction of a new Municipal Water Plant," and on a separate line the words, "Against the Issuance of Eight Million Dollars in bonds for the Construction of a new Municipal Water Plant," with a space opposite each such line in which the voter may make his mark indicating his vote.

SECTION 4. In the event that the first of said questions, to-wit, that mentioned in section 2 hereof, shall be submitted, then voters wishing to vote in the affirmative and in favor of purchase shall put a cross-mark X in the space opposite the words, "For the Issuance of eight million dollars in bonds for the purchase and repair of the existing water plant, under the provisions of section 264-*a* of the Charter," and voters wishing to vote in the negative and against the issuance of bonds for such purchase shall put a cross-mark X in the space opposite the words, "Against the issuance of eight million dollars in bonds for the purchase and repair of the existing water plant under the provisions of section 264-*a* of the Charter."

SECTION 5. In the event that the second of said questions, to-wit, that mentioned in section 3 hereof, shall be submitted at said elec-

tion then voters wishing to vote in the affirmative and in favor of the construction of a new municipal water plant shall put a cross-mark X in the space opposite the words, "For the issuance of eight million dollars in bonds for the construction of a new municipal water plant," and voters wishing to vote in the negative and against issuance of bonds for the construction of a new Municipal water plant shall put a cross-mark X in the space opposite the words "Against the issuance of eight million dollars in bonds for the construction of a new municipal water plant."

SECTION 6. That said Public Utilities Commission may certify for submission at said special election, and to be printed on the ballot therefor, an alternative bond proposition for the issuance of bonds in such sum as it may deem advisable for the acquisition or construction of a water plant or any part thereof, by any of the
332 ways within its powers in said section 264-*a* mentioned, and said alternative bond proposition shall be placed on said ballot in such form as said Commission may determine.

SECTION 7. The officers of election in the several voting precincts shall receive no ballots at said special election, upon either of the propositions hereinbefore described, except from taxpaying electors.

SECTION 8. The special election hereby called for the first Tuesday in September, 1910, shall be held, had and conducted in the various precincts of the City and County of Denver between the hours of 7 o'clock in the morning and 7 o'clock in the evening, and according to the provisions of the Constitution and laws of the State and the Charter of the City and County of Denver.

SECTION 9. The clerks of election shall be furnished with appropriate tally books with proper designations and shall set forth therein the votes cast at said election on the different propositions submitted, and the votes so cast shall be canvassed and returned and the returns thereof declared in the same manner as near as may be as is provided for the canvass, return and declaring of the votes at a general election for candidates.

SECTION 10. The clerks of the City and County, the election commission and such other officials as are charged with duties relating thereto shall for said election, make such publications and give such notices and make such appointments, and do all acts and things in such manner and form and at such times as are prescribed by the Constitution and laws of the State of Colorado, and by the Charter of the City and County of Denver. The votes
333 & 334 cast at said election shall be canvassed, and the result ascertained, determined and certified in accordance with the requirements of the Constitution and laws of the State of Colorado and the Charter of the City and County of Denver.

W. M. ROBERTSON,
President of the Board of Supervisors.
JOHN CONLON,
President of the Board of Aldermen.

Signed and approved by me this 6th day of July, 1910.

R. W. SPEER, *Mayor.*

Attested by the undersigned with the corporate seal of the City and County of Denver.

[SEAL.]

BURT F. DAVIS,
Clerk of the City and County of Denver,
By J. A. DOWSON,
Deputy Clerk.

335 (Endorsed.)

In the Circuit Court of the United States within and for the District of Colorado.

In Equity. No. 5572.

THE NEW YORK TRUST COMPANY, a Corporation, Complainant,

vs.

THE CITY AND COUNTY OF DENVER, a Municipal Corporation; Robert W. Speer, as Mayor of the City and County of Denver; Burt F. Davis, as Clerk of said City and County of Denver; Albion K. Vickery, as Auditor of said City and County of Denver; Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows, as Members of and Constituting the Public Utilities Commission of said City and County of Denver; Ellis Meredith, A. E. Mauff and Harry Petrie, as Members of and Constituting the Election Commission of said City and County of Denver; The Denver Union Water Company, a Corporation, and The South Platte Canal and Reservoir Company, a Corporation, Defendants.

Cross Bill of The Denver Union Water Company.

Index.

	Page
Cross Bill	1
Exhibit A—Ordinance No. 44 of 1890	67
Exhibit B—Ordinance No. 163 of 1907	89
Exhibit C—Charter Amendment, Section 264 A	108
Exhibit D—Ordinance No. 98 of 1910	115

Filed Aug. 25, 1910. Charles W. Bishop, Clerk.
Vol. 1. Filed Sept. 24, 1910. John D. Jordan, Clerk.

336 In the Circuit Court of the United States for the District of Colorado.

No. 5572.

THE NEW YORK TRUST COMPANY, Complainant,
versus
THE CITY AND COUNTY OF DENVER et al., Respondents.

Volume 2.

Fifty-fifth Day, May Term, Thursday, August 25th, A. D. 1910.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the third day of May, A. D. 1910.

5572. In Chancery.

THE NEW YORK TRUST COMPANY
vs.
THE CITY AND COUNTY OF DENVER et al.

Bill for Injunction and for Other Relief.

On reading the cross-bill of The Denver Union Water Company, defendant and cross-complainant herein, and on motion of said cross-complainant, by its solicitor;

It is ordered that the subpœna to be issued on the said cross-bill may be served upon the complainant herein, The New York Trust Company, by delivery of a copy thereof to Henry McAllister, Jr., one of the counsel and solicitors of record herein for said complainant, The New York Trust Company, and who resides and has his office and place of business in the city and county of Denver, state and district of Colorado.

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the Circuit Court of the United States for the District of Colorado, Sitting at Denver.

The President of the United States of America to The New York Trust Company, The City and County of Denver, Robert W. Speer, as Mayor of the City and County of Denver; Burt F. Davis, as Clerk of said City and County of Denver; Albion K. Vickery, as Auditor of said City and County of Denver; Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows, as Members of and Constituting the Public Utilities Commission of said City and County of Denver; Ellis Meredith, A. E. Mauff and Harry Petrie, as Members of and Constituting the Election Commission of said City and County of Denver, Greeting:

337 You and each of you are hereby commanded, that you appear before the Judges of the circuit court of the United

States for the district of Colorado, at the city and county of Denver in said district on the first Monday in October next (it being the third day of October, A. D. 1910) to answer the cross-bill of complaint of The Denver Union Water Company, this day filed in the office of the clerk of said court in said city and county of Denver, then and there to receive and abide by such judgment and decree as shall then or thereafter be had upon said cross-bill of complaint, upon pain of judgment being pronounced against you by default, and a decree had and entered accordingly.

To the Marshal/ of the District of Colorado to execute and make due return.

Witness The Honorable John M. Harlan, Associate Justice of the United States, and the seal of the said circuit court, at the city and county of Denver aforesaid, this twenty-fifth day of August, in the year of our Lord one thouand nine hundred and ten, and of the Independence of the United States the 135th year.

[Seal U. S. Circuit Court.]

CHARLES W. BISHOP, *Clerk*,
By ALBERT TREGO, *Deputy Clerk*.

Memorandum.

The above named defendants are hereby notified that unless they and each of them shall enter their appearance in the office of the clerk of said court, at the city and county of Denver aforesaid, on or before the day to which the above writ is returnable, the bill of complaint will be taken against them as confessed, and a decree entered accordingly.

CHARLES W. BISHOP, *Clerk*,
By ALBERT TREGO, *Deputy Clerk*.

Marshal's Return.

UNITED STATES OF AMERICA,
District of Colorado, ss:

I hereby certify and return that I served the annexed subpœna in chancery on the therein-named The City and County of Denver, Robert W. Speer as mayor of the city and county of Denver; Albion K. Vickery, as auditor of said city and county of Denver; Edwin Van Cise and A. Lincoln Fellows as members of the Public Utilities Commission of said city and county of Denver, Ellis Meredith and A. E. Mauff, as members of the Election Commission of said
338 city and county of Denver, by handing to and leaving a true and correct copy thereof with Robert W. Speer for the city and county of Denver and to each of the above named defendants personally at Denver in said district on the 25th day of August A. D. 1910.

D. C. BAILEY, *U. S. Marshal*,
By E. B. CHADWICK, *Deputy*.

UNITED STATES OF AMERICA,
District of Colorado, ss:

I hereby certify and return that I have served the annexed subpœna in chancery on the therein-named Harry Petrie, as member of the Election Commission of the city and county of Denver by handing to and leaving a true and correct copy thereof with Harry Petrie personally, at Denver in said district on the 27th day of August, A. D. 1910.

D. C. BAILEY, *U. S. Marshal,*
By E. B. CHADWICK, *Deputy.*

UNITED STATES OF AMERICA,
District of Colorado, ss:

DENVER, *August* 29, 1910.

I have duly executed the within writ, by delivering to The New York Trust Company, Burt F. Davis, as clerk of the city and county of Denver, Armour C. Anderson, as a member of the Public Utilities Commission of the city and county of Denver, and each of them, personally, a true copy of the within writ, at the place and time as follows, to-wit: As to The New York Trust Company, on the 25th day of August, A. D. 1910, at Denver in Denver County, by delivering a true copy of the within writ to Henry McAllister, as the solicitor for said company; as to Burt F. Davis and Armour C. Anderson, on the 25th day of August, A. D. 1910, in Denver in Denver County.

This writ therefore returned executed as the law directs, this 29th day of August, 1910.

D. C. BAILEY, *Marshal,*
By THOMAS CLARKE,
Deputy Marshal.

Endorsed: No. 5572. United States Circuit Court for the District of Colorado. In Chancery. The New York Trust Company vs. The City and County of Denver, et al. Subpœna on Cross-Bill of The Denver Union Water Company. Returnable to rule day, first Monday in October, A. D. 1910. Charles W. Bishop, Clerk. Filed Aug. 30, 1910. Charles W. Bishop, Clerk. Gerald Hughes, Dorsey and Hodges, A. M. Stevenson, Solicitors for cross-complainant.

339

Fifty-fifth Day, May Term, Thursday, August 25th, A. D. 1910.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the third day of May, A. D. 1910.

5572. In Chancery.

THE NEW YORK TRUST COMPANY

vs.

THE CITY AND COUNTY OF DENVER; ROBERT W. SPEER, as Mayor of the City and County of Denver; Burt F. Davis, as Clerk of said City and County of Denver; Albion K. Vickery, as Auditor of said City and County of Denver; Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows, as Members of and Constituting the Public Utilities Commission of said City and County of Denver; Ellis Meredith, A. E. Mauff and Harry Petrie, as Members of and Constituting the Election Commission of said City and County of Denver; The Denver Union Water Company, and The South Platte Canal and Reservoir Company.

Bill for Injunction and for Other Relief.

Upon motion of The Denver Union Water Company, defendant and cross-complainant herein;

It is ordered that said cross-complainant's motion for injunction filed herein be, and the same hereby is set for hearing before the court at Denver, Colorado, upon Wednesday, the 31st day of August, A. D. 1910, at 10 o'clock a. m. and that notice of such application and hearing be forthwith served upon the complainant herein and all of the defendants named above except The South Platte Canal and Reservoir Company and The Denver Union Water Company.

MONDAY, *August 29th, A. D.* 1910.

Before the Clerk.

340 5572. In Chancery.

THE NEW YORK TRUST COMPANY

vs.

THE CITY AND COUNTY OF DENVER; ROBERT W. SPEER, as Mayor of the City and County of Denver; Burt F. Davis, as Clerk of said City and County of Denver; Albion K. Vickery, as Auditor of said City and County of Denver; Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows, as Members of and Constituting the Public Utilities Commission of said City and County of Denver; Ellis Meredith, A. E. Mauff and Harry Petrie, as Members of and Constituting the Election Commission of said City and County of Denver; The Denver Union Water Company, and The South Platte Canal and Reservoir Company.

Bill for Injunction and for Other Relief.

At this day comes George Q. Richmond, Esquire, a solicitor of this court, and files and enters herein his appearance, and the ap-

pearance of Henry A. Lindsley, Esquire, as solicitors for and on behalf of respondents The City and County of Denver, Robert W. Speer, as mayor of the City and County of Denver, Burt F. Davis, as clerk of said City and County of Denver, Albion K. Vickery, as Auditor of said City and County of Denver, Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows, as members of and constituting the Public Utilities Commission of said City and County of Denver, Ellis Meredith, A. E. Mauff, and Harry Petrie, as members of and constituting The Election Commission of said City and County of Denver.

Fifty-sixth Day, May Term, Wednesday, August 31st, A. D. 1910.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the third day of May, A. D. 1910.

5572. In Chancery.

THE NEW YORK TRUST COMPANY
vs.
THE CITY AND COUNTY OF DENVER et al.

Bill for Injunction and for Other Relief.

This cause comes on now to be heard on the application of the complainant for an injunction, and upon the application of the respondent The Denver Union Water Company for an injunction upon the cross-bill herein, Henry McAllister, Junior, Esquire, appearing as solicitor for the complainant, and Gerald Hughes, Esquire, appearing as solicitor for the respondent The Denver Union
341 Water Company, George Q. Richmond, Esquire, appearing as solicitor for the respondent The City and County of Denver and others, and Charles S. Thomas, Esquire, appearing as solicitor for the respondent Armour C. Anderson and others, and is argued by counsel to the hour of adjournment.

In the Circuit Court of the United States for the District of Colorado.

In Equity. No. 5572.

THE NEW YORK TRUST COMPANY, a Corporation, Complainant,
vs.
THE CITY AND COUNTY OF DENVER, a Municipal Corporation; Robert W. Speer, as Mayor of the City and County of Denver; Burt F. Davis, as Clerk of said City and County of Denver; Albion K. Vickery, as Auditor of said City and County of Denver; Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows, as Members of and Constituting the Public Utilities Commission of said City and County of Denver; Ellis Meredith, A. E. Mauff and Harry Petrie, as Members of and Constituting the Election

Commission of said City and County of Denver; The Denver Union Water Company, a Corporation, and The South Platte Canal and Reservoir Company, a Corporation, Defendants.

Affidavit of William P. Robinson.

STATE OF COLORADO,
City and County of Denver, ss:

William P. Robinson, being first duly sworn, on his oath deposes and says, that he has resided in Denver since the month of November, 1887, that in the month of June, 1888, he became connected with The Denver Water Company in the capacity of clerk; that since said date he has been continuously connected with said Denver Water Company and its successors, The Denver City Water Works Company, The American Water Works Company of New Jersey, and The Denver Union Water Company, one of the defendants and the cross-complainant herein; that since the month of March, 1889, he has practically had charge of the affairs of said respective companies, and since the year 1897 has been assistant general manager and later general manager of said The Denver Union Water Company, which position he now occupies.

Affiant further says that the records, books and papers of said companies with which he has been immediately connected as aforesaid, as well as all predecessor companies which had been
342 engaged in furnishing the City and County of Denver and its predecessors with a water supply, are in the possession and control of The Denver Union Water Company, and affiant has knowledge of the same and bases his affidavit in reference to matters which occurred prior to his connection with said companies thereupon.

Affiant further says that the first company to be organized for the purpose of furnishing to the City of Denver a water supply was The Denver City Water Company, incorporated November 30, 1870, under the laws of the territory of Colorado.

Affiant further says that on December 16, 1870, a contract was entered into between the city of Denver and said The Denver City Water Company, pursuant to action theretofore taken by the city council of said city; that the papers hereto attached and bound together under the designation "Exhibit A" constitute a true copy of said contract of 1870, and also true copies of the records of the proceedings of the city council antecedent thereto and referring to said contract, as affiant is informed and believes, and as appears from the records of said The City of Denver and said The Denver City Water Company, which latter are now in possession of said The Denver Union Water Company.

Affiant further says that, as appears from the records of the council of said city of Denver, various and sundry supplemental contracts and modifications of said contract of December 16, 1870, all referring to the supply of water to be furnished to the city for municipal purposes, hydrant rentals, and like matters were made and entered into between said December 16, 1870, and May 1,

1874; that from an examination of the records of the city council covering said period it appears that, so far as hydrant rentals were concerned, a new arrangement changing the terms of the contract of 1870 in that particular was made and entered into between the city and the Water Company almost every year; that, as appears from said records of said city, question also arose early in the year 1874 as to whether or not said city had the right to grant a monopoly of the water supply business to The Denver City Water Company as the original contract of 1870 purported to do; that on May 9, 1874, said city of Denver entered into another contract with said The Denver City Water Company, pursuant to action theretofore taken by the city council of said city, and the papers bound together under the designation "Exhibit B" and hereunto attached are a true copy of said contract of May 9, 1874, and the precedent action of the city council in reference thereto, as appears from the records of said city and from the records of said The Denver City
343 Water Company, the last mentioned of which are now in possession of The Denver Union Water Company.

Affiant further says that in the year 1882 said The Denver City Water Company was succeeded by the Denver Water Company, which then acquired all of the property of said The Denver City Water Company, including all of its rights under ordinances of or contracts with said the city of Denver, and that no further ordinance or contract was sought by or granted to either said The Denver City Water Company or said The Denver Water Company until the passage and approval of Ordinance No. 44 of the Series of 1890, a copy of which is attached to the bill of complaint and also to the cross-bill herein, designated as "Exhibit A."

Affiant further says that in the year 1886 The Beaver Brook Water Company was organized as a corporation under the laws of the state of Colorado, for the purpose of supplying what was then the town of Highlands, a municipal corporation organized and existing under the general statutes of the state of Colorado; that on July 12, 1886, pursuant, as affiant is informed and believes, to due municipal action, the town of Highlands, which was then and there a municipal corporation duly organized and existing under the general statutes of the state of Colorado, enacted by its town council an ordinance, wherein and whereby it was provided, among other things, that said The Beaver Brook Water Company

—shall be and is hereby granted the exclusive right and authority to lay at its own expense any and all necessary mains, pipes and conduits under and along the streets, alleyways, bridges, avenues and other places within the limits of the town of Highlands, for the purpose of supplying the said town of Highlands with water for the space of twenty-five years from the date of this ordinance; and The Beaver Brook Water Company is authorized to enter upon any and all such places and break at its own expense the surface and make the necessary excavations thereon.

That in and by said ordinance other provisions were made, including provisions concerning charges for hydrant rental and the

supply of water for municipal purposes, as well as the maximum rates to be charged for the supply of water to private consumers; that on January 13, 1888, pursuant, as affiant is informed and believes, to proper municipal action by said town of Highlands, a contract was entered into by and between said town and said The Beaver Brook Water Company, wherein and whereby, among other things, said town did—

344 —grant unto the party of the second part the sole and exclusive right to construct and erect water works, and lay all necessary mains, pipes and conduits under and along the streets, alleyways, bridges and avenues within the corporate limits of the said town of Highlands for the purpose of supplying said town and the inhabitants thereof with water for fire, domestic and other purposes, for the full period of twenty (20) years from the 24th day of December, 1886.

And in and by said contract said The Beaver Brook Water Company was further "authorized to enter upon any and all streets, alleyways, bridges and avenues and break at its own expense the surface thereof and make the necessary excavations therein when the same may be required for the aforesaid purposes." In and by said contract other provisions were made relative to the charges to be imposed for hydrant rental and other municipal uses of water, and likewise the charges to be imposed for water delivered to private consumers. In and by said contract it was likewise provided that all contracts and ordinances theretofore made or passed by and between the parties thereto should be void and of no effect, that said town of Highlands continued to be a separate municipality until August 25, 1896, on which date it was annexed to the city of Denver, that on December 5, 1892, the town of North Denver, then a municipal corporation organized and existing under the general laws of the state of Colorado, pursuant as affiant is informed and believes, to due municipal action theretofore had, entered into a contract with said The Beaver Brook Water Company, wherein and whereby, among other things, said town did—

—grant unto the party of the second part and its assigns the sole and exclusive right to construct and erect water works and lay all necessary mains, pipes and conduits under and along the streets, alleyways, bridges and avenues within the corporate limits of the said town of North Denver, for the purpose of supplying said town and the inhabitants thereof with water for fire, domestic and other purposes for the full period of twenty (20) years from the 8th day of November, 1892.

And the said The Beaver Brook Water Company was likewise thereby authorized to "enter upon any and all streets, alleyways, bridges and avenues and break at its own expense the surface thereof, and make the necessary excavations therein when the same may be required for the aforesaid purpose;" that said contract contained various other provisions relative of the supply of water, both to the municipality and to private consumers, and relative to the charges

to be made therefor; that said town of North Denver after-
345 wards changed its name to the town of Berkeley, and was consolidated into and became a part of The City and County of Denver by the adoption of Article XX of the Constitution on November 4, 1902.

Affiant further says that all of the property of said The Beaver Brook Water Company, including its ordinance and contract rights with said municipalities, passed to and became the property of The Denver Union Water Company on October 20, 1894, by mortgage foreclosure proceedings and other mesne conveyances.

Affiant further says that in the year 1888 The Mountain Water Company was organized as a corporation under the laws of the state of Colorado, and on September 18, 1889, the town of Barnum, then a municipal corporation organized and existing under the general laws of the state of Colorado, pursuant, as affiant is informed and believes, to due municipal action theretofore had, made and entered into a contract with said The Mountain Water Company, wherein and whereby, among other things, said town did

—grant unto the party of the second part the right to construct and erect water works and lay all necessary iron mains, pipes and conduits under and along the streets, alleys, bridges and avenues within the corporate limits of the said town of Barnum, for the purpose of supplying the said town and the inhabitants thereof with water for fire, domestic and other purposes, for the full period of twenty years from the first day of September, A. D. 1889.

And in and by said contract said Water Company was "authorized to enter upon any and all streets, alleys, bridges and avenues and break at its own expense the surface thereof, and make the necessary excavations therein when the same may be required for the aforesaid purpose." And in and by said contract other provisions were made relative to the supply of water for municipal purposes and to private consumers, and relative to the charges to be made therefor, and other like matters; that all of the property of said The Mountain Water Company, including all rights under said ordinance or contract passed in the year 1890 to The Denver City Water Works Company, a corporation organized and existing under the laws of the state of Colorado, which had theretofore acquired all of the property of The Denver Water Company, and through The American Water Works Company of New Jersey said property subsequently passed to The Denver Union Water Company on or about October 20, 1894, and
has ever since been owned by the last named company; that
346 on May 13, 1896, said town of Barnum, which was still a separate municipal corporation, did, pursuant, as affiant is informed and believes, to due municipal action theretofore had, enter into another contract with said The Denver Union Water Company, wherein it was provided, among other things, that said town did—

—grant *upon* The Denver Union Water Company, its successors and assigns, the right to construct and erect water works and lay all

necessary iron mains, pipes and conduits under and along the streets, alleys, bridges and avenues within the corporate limits of the said town of Barnum, and any and all additions that may hereafter be made thereto, for the purpose of supplying said town and the inhabitants thereof with water for fire, domestic and other purposes for the full period from the date of this contract until and including the 10th day of April, A. D. 1910.

And thereby said company was further authorized "to enter upon any and all streets, alleys, bridges and conduits, and break at its own expense the surface thereof, and make the necessary excavations therein when the same may be [acquired] for the aforesaid purpose." Said last-mentioned contract contained certain changes in the provisions of the former contract relative to the supply of water and the charges to be made therefor; and in and by said last mentioned contract it was expressly provided that—

—by the acceptance of this franchise and the execution of this contract The Denver Union Water Company loses no rights in regard to the occupation of the streets, alleys or other public places of the town of Barnum which it now possesses by virtue of the ordinances and contracts heretofore granted and made to and with The Mountain Water Company, and to and with The Citizens Water Company; but the said rights are hereby recognized and confirmed and are to be independent of and not merged in this contract.

Affiant further says that on March 6, 1890, said town of Barnum by ordinances granted to The Citizens Water Company, then a corporation organized and existing under the laws of the state of Colorado, the right to lay and maintain in perpetuity a water main in, through and along the public street or avenue called the Boulevard in the said town of Barnum, from the south boundary line of said town to the north boundary line thereof, and to examine, repair, renew and replace such water main as necessity might from time to time require; and that this ordinance right, together with all other property of The Citizens Water Company, passed to The Denver Union Water Company by conveyance and due assignment on or about October 20, 1894.

347 Affiant further says that said town of Barnum was annexed to the city of Denver on September 1, 1896.

Affiant further says that all of the property of The Denver Water Company, of The Beaver Brook Water Company and of The Mountain Water Company, including all rights theretofore acquired by either of those companies under and by virtue of any ordinance of or contract with any municipality, did late in the year 1890 or early in the year 1891 pass by due conveyance and assignment to The Denver City Water Works Company, then and there a corporation duly organized and existing under the laws of the state of Colorado; that all of said property, by due conveyance and assignment, afterwards and during the year 1891, passed to The American Water Works Company of New Jersey, a corporation organized and existing under the laws of the state of New Jersey.

Affiant further says that The Citizens Water Company was or-

ganized in the year 1889 as a corporation under and by virtue of the laws of the state of Colorado.

Affiant further says that on September 16, 1891, the town of Colfax, then a municipal corporation organized and existing under the general laws of the state of Colorado, by ordinance then and there enacted, as affiant is informed and believes, pursuant to due municipal action, granted to The Citizens Water Company, its successors and assigns—

—the right to lay put in, maintain and continue water mains, hydrants, valves and all fixtures and apparatus necessary for the working and management of said mains, hydrants and valves, and to replace and repair said water maians, hydrants, valves and fixtures and apparatus as necessity may from time to time require, and to make the necessary connections therewith of service pipes for the distribution of water in, upon, through and along all the streets, avenues and alleys in the said town of Colfax.

That said ordinance likewise contained provisions relative to the furnishing of a water supply for municipal uses and for the uses of private consumers, and the charges to be made therefor; that no period of time was mentioned in said ordinance except that in section 6 thereof the town of Colfax was required to pay $35.00 per annum for each and every hydrant "in two equal semi-annual payments, payable respectively on the first days of the months of November and May of each and every year, for the period of twenty years from and after the date and passage of this ordinance.

348 Affiant further says that said town of Colfax was annexed to the city of Denver on July 7, 1897.

Affiant further says that on March 4, 1890, the town of Highlands, being then a separate municipal corporation as aforesaid, did by ordinance, which, as affiant is informed and believes, was duly enacted, grant unto The Citizens Water Company—

—the right to lay and maintain in perpetuity forever a water main in, through and along the Boulevard, twenty feet equi-distant from the center line thereof from the south boundary line of said city of Highlands to Ashland avenue, and in, through and along the street or avenue called Ashland avenue, twenty feet equi-distant from the center line of said avenue, from the west boundary line of said city of Highlands to the east boundary line thereof; and the right to examine, repair, remove and replace said water main as necessity may from time to time require.

Affiant further says that on November 7, 1892, the town of South Denver, which was then and there a municipal corporation organized and existing under the general laws of the state of Colorado, by ordinance which, as affiant is informed and believes was duly enacted, granted to said The Citizens Water Company—

—the right to lay and maintain for the period of twenty years a water main of the same character as that already laid in University avenue south of the limits of South Denver, not exceeding four feet in diameter, inside measurement, in and along the street or avenue

commonly called University avenue, from the south bounds of the town of South Denver to the most northerly bounds thereof.

Affiant further says that said town of South Denver was annexed to the City of Denver on February 7, 1894.

Affiant further says that on May 26, 1891, the town of Valverde, which was then and there a municipal corporation organized and existing under the general laws of the state of Colorado, by ordinance which, as affiant is informed and believes, was duly enacted, granted to the said The Citizens Water Company—

—the right to lay and maintain for a period of twenty years a water main in, through and along the public street known as Alameda avenue in said town of Valverde, on a linen twenty-three feet distant from the south boundary of said Alameda avenue from the east boundaries of said town, into the west boundary line thereof.

349 And in and by said ordinance it was further provided that said The Citizens Water Company should extend a main not exceeding six inches in diameter, in and along any street in said town of Valverde and furnish water therefrom to the inhabitants of said town whenever the consumers of water should make a certain guarantee of bona fide revenue therefrom; and said company was likewise required to set hydrants along the line of any of its mains as the Board of Trustees of said town might designate, and furnish water therefrom for the extinguishment of fires, at a certain rate mentioned in said ordinance; and was further required to furnish water to all the inhabitants of said town along the line of its mains, under the same rules and regulations and at the same rate of charges as it should furnish water to the inhabitants of the city of Denver for like purposes.

Affiant further says that all of the property of said The Citizens Water Company, including all of its rights under any ordinance of or contract with any municipality, passed by due assignment or conveyance to The Denver Union Water Company on or about October 20, 1894; and thereafter by ordinance of the town of Valverde, the provisions of said prior ordinance were extended to other streets, alleys and avenues therein; that said town of Valverde was consolidated within and became a part of the City and County of Denver by the adoption of Article XX of the Constitution on November 4, 1902.

Affiant further says that on the respective dates hereinafter mentioned the several towns, each of which was then and there a municipal corporation organized and existing under the general laws of the State of Colorado, by ordinance, which was in each instance, as affiant is informed and believes, duly enacted, granted to said The Denver Water Company hereinabove mentioned the right and privilege of maintaining and operating water works within said respective municipalities, and all extensions thereof, and of laying down and continuing and maintaining water pipes, valves, hydrants and other apparatus for the conveyance and distribution of water in, upon, along and through the streets, alleys, lanes and public places within said respective municipalities, and in, upon and along all extensions

thereof and additions thereto; each of said ordinances being in substance and effect the same as Ordinance No. 44 of the Series of 1890, a copy of which is attached to the bill of complaint and the cross-bill herein, designated as "Exhibit A" and containing no limitation of time except as expressed in the same language contained in said Ordinance No. 44. The said municipalities mentioned above
350 and the dates of the enactment of said several ordinances were and are as follows, to-wit:

Town of Elyria	February 24, 1891,	
Town of Harmon	February 17, 1891,	
Town of Mont Clair	May 8, 1890,	
	September 4, 1890,	
	December 4, 1890,	
	May 21, 1891,	
	June 18, 1891,	
	July 23, 1896,	(Denver Union Water Co.)

Affiant further says that said town of Harmon was annexed to the city of Denver on February 18, 1895, and said towns of Elyria and Mont Clair were consolidated within and became a part of the City and County of Denver by the adoption of Article XX of the Constitution on November 4, 1902.

Affiant further says that all of the various ordinances hereinbefore mentioned were accepted by the respective companies named therein, and the pipes, mains and other apparatus of said companies laid in the respective streets of said several municipalities; that all of the rights granted to or acquired by any and all of said several companies, under all or any of said ordinances or contracts with said various municipalities, afterwards passed to and became vested in said The Denver Union Water Company on or about October 20, 1894, and have since remained the property of that company; that the various municipalities hereinabove mentioned include all of the municipalities subsequently merged in and now a part of the City and County of Denver, except the town of Globeville and the town of South Denver; that in said town of Globeville the distributing system of pipes, mains and other apparatus was constructed for and at the expense of said town, while a separate municipality by The Citizens Water Company, and title thereto became vested in said town and is now vested in the City and County of Denver; that said The Citizens Water Company, prior to the acquisition of its property by The Denver Union Water Company, and since said date The Denver Union Water Company has furnished water to be supplied through said distributing system in Globeville, at a flat rate per thousand gallons, paid by said town of Globeville and thereafter and now paid by the City and County of Denver, and is still continuing so to do; that the town of Globeville was consolidated within and became a part of the City and County of Denver by the adoption of Article XX of the Constitution on November 4, 1902; that
351 of the pipes, mains and distributing system in the said town of South Denver, a portion thereof was the property of said town and is now the property of the City and County of Denver,

and the remaining portion thereof was laid by The Denver Union Water Company and is now its property; that the situation in South Denver is hereinafter more fully related; that said town of South Denver was annexed to the City of Denver on February 7, 1894.

Affiant further says that on April 10, 1890, and for a considerable period previous thereto, considerable apprehension existed in the city of Denver concerning the obtaining of an adequate supply of water; that said city was then and for some time had been rapidly growing; that previous to that time the water companies engaged in supplying water to said city and its inhabitants had been obtaining the same by direct supply from the streams in the vicinity of said city; that owing to the scarcity of water in said streams at certain seasons of the year there had from time to time been a scarcity or threatened scarcity of water for the supply of said city and its inhabitants; that as a result said city and its inhabitants were deeply concerned in reference to the matter, and it was evident that if the city continued to grow as it promised to do some provision must be made to supply in an adequate manner the increasing needs of said city and its inhabitants for water, which could be done only by the construction of an adequate system of storage reservoirs, large enough for the needs of the city and its inhabitants, not only in the immediate present, but also in the reasonably near future; and it was recognized that such works could be provided, the necessary water rights therefor obtained and conduits therefrom to the distributing system in said city and outlying towns constructed only at very large cost, to-wit, an investment of capital very much greater than any which had theretofore been made in the plant or plants provided at that time for the supply of water; that these conditions existed on said April 10, 1890, and in the light of these conditions said Ordinance No. 44 of the Series of 1890 was enacted.

Affiant further says that on said April 10, 1890, and prior and subsequent thereto, W. A. Underwood was connected with The Denver Water Company in a legal capacity, and thereafter, in the year 1891, became a member of the Board of Directors, President and General Counsel of The American Water Works Company, which then succeeded The Denver Water Company and The Denver City Water Works Company; that in the preparation of said Ordi-
352 nance No. 44 of the Series of 1890, and the agreement with the city upon the terms thereof, the interests of said The Denver Water Company were looked after by said Underwood; that when said ordinance was finally agreed upon and enacted the said Underwood advised The Denver Water Company that in, by and under the terms of said ordinance the City would, at the expiration of the period of twenty years therein mentioned, be obligated either to purchase the water works system or plant, as therein contemplated, or, in lieu thereof, to renew the contract evidenced by said ordinance for an additional period of twenty years.

Affiant further says that such has ever since been and is now the understanding of The Denver Water Company and its various successors including The Denver Union Water Company, as to the meaning and legal effect of said Ordinance No. 44 of the Series of

1890, and that in reliance thereon said The Denver Water Company and its said various successors have invested the large amounts of capital which have been required for the acquisition of said plant, and the various portions thereof, and the various enlargements, extensions and betterments thereof and thereto which have since been provided; that said The Denver Union Water Company acquired said property in reliance upon said construction of said contract evidenced by said ordinance, and accordingly the bonds issued by said company and secured by deed of trust, as set forth in the bill of complaint herein, by the trustee in said mortgage or deed of trust, were made to run to and mature in the year 1914, with the privilege of paying the same within the year beginning April 10, 1910, and ending April 9, 1911, provided the city should exercise its right of purchase, all as appears from a copy of said mortgage or deed of trust attached to the bill of complaint herein and designated as "Exhibit B" thereto.

Affiant further says that said city of Denver and its successors, The City and County of Denver, has at all times had knowledge, as affiant is informed and believes, of said understanding and construction of said contract by said The Denver Water Company and its successors, including said The Denver Union Water Company, and until very recently has not dissented therefrom, but, on the contrary, has acquiesced and concurred therein; that prior to February 7, 1894, on which date the town of South Denver, then a municipal corporation organized under the general laws of the state of Colorado, was annexed to the city of Denver, said town of South Denver had provided and was then the owner, in possession and operating a municipal water works system or plant; that
353 said water works system passed to said The City of Denver upon said annexation and was thereafter operated and maintained by said city of Denver; that on December 15, 1894, and within two months after the acquisition by The Denver Union Water Company of the water works system or plant then supplying the city of Denver and its inhabitants as hereinabove set forth, said city of Denver caused to be enacted by due municipal action, as affiant is informed and believes its Ordinance No. 54 of the Series of 1894, a copy of which is hereunto attached and marked "Exhibit C" to this affidavit; that said ordinance was thereafter duly accepted by said The Denver Union Water Company, and pursuant thereto, and prior to the 10th day of April, 1910, said The Denver Union Water Company maintained and operated said water works system or plant in the territory formerly embraced within the town of South Denver, and from time to time added thereto by placing in the streets, alleys, avenues and public places of said territory, at its own cost, such pipes, mains, valves and other apparatus as might be necessary, all as contemplated in said ordinance or lease, and through said system supplied water to said territory and the inhabitants thereof, both for municipal uses and for the uses of private consumers; that since said April 10, 1910, said city and county of Denver has not purchased or offered to purchase said pipes, mains, valves and other apparatus so placed in said territory by said The Denver

Union Water Company, or any part thereof; and said The Denver Union Water Company has continued and is now continuing to supply water through all of said system in said territory, both that portion belonging to the City and County of Denver and that portion belonging to The Denver Union Water Company, as heretofore, and has also since said date enlarged said system and laid additional pipes and mains in certain of the streets, alleys, avenues, and public places in the territory formerly embraced within the town of South Denver, and invested therein considerable sums of money, all with the knowledge and consent of said The City and County of Denver, and at the request of the inhabitants of that portion of the same formerly constituting said town of South Denver.

Affiant further says that on March 3, 1908, and for some time prior and subsequent thereto, the Honorable Charles S. Thomas was, as affiant is informed and believes, employed by the City and County of Denver as special counsel, having in charge the interests of said City and County of Denver, in connection with the appraisement then being conducted, as more fully set forth in the bill of complaint herein, and otherwise having charge of the inter-
354 ests of said City and County in respect of its relation to said The Denver Union Water Company; that on said March 3, 1908, in answer, as affiant is informed and believes, to an inquiry from the mayor of said City and County of Denver as to the correct construction of said Ordinance No. 44 of the Series of 1890, and the contract evidenced thereby, the said Thomas, acting in his capacity as special counsel as aforesaid, wrote and delivered to said mayor of the City and County of Denver an opinion thereon, and affiant attaches hereunto, designated as "Exhibit D" what he is informed and believes is a true copy of said opinion, as the same remains on file in the records of said City and County of Denver.

Affiant further says that, to the best of his knowledge, information and belief, no official or other action was ever taken by said The City and County of Denver indicating dissent from said construction of Ordinance No. 44 of the series of 1890, originally placed thereon by The Denver Water Company, and ever since relied and acted upon by that company and its successors, until the alleged adoption of said Section 264-A of the Charter at the city election in May, 1910, all as more fully set forth in the bill of complaint and the cross-bill herein.

Affiant attaches hereto, as "Exhibit E" to this affidavit, a pamphlet entitled "Report of the Public Utilities Commission (Abridged)" which, as affiant is informed and believes, is an abridged copy of a report of said Public Utilities Commission, which report was issued on August 20, 1910, and which pamphlet, as affiant is informed and believes as well as the original report, of which it is an abridgement, has by authority of said Commission or with its consent been issued, published and given general circulation among the people of the City and County of Denver; that said pamphlet is presented with the distinct reservation that neither the complainant nor the cross-complainant herein concedes the correctness of any or all of the statements of fact therein contained, or is bound thereby, but for

the purpose of bringing to the attention of the court the attitude and purposes of said Public Utilities Commission, as publicly and officially declared.

Further affiant saith not.

WILLIAM P. ROBINSON.

Subscribed and sworn to before me this 29th day of August, A. D. 1910.

My commission expires February 19, 1911.

ALFRED KERNS,
Notary Public.

[NOTARIAL SEAL.]

355 EXHIBIT A.

The Denver City Water Co. 1870.

(Copy.)

City Council Proceedings.

THURSDAY, *November 17th*, 1870.

Council met pursuant to adjournment.

Mayor in the chair.

Roll called.

Absent; Alderman Bates.

Quorum present.

Journal of preceding meeting read and approved.

Jas. Archer, Eng. of the Denver City Water Works, requested the privilege of laying the views of the company before the council, which being granted, Mr. Archer stated the advantages to be derived by the citizens of Denver and Colorado, by the immediate construction of water works in the city of Denver, and closed by requesting a meeting with his company by a committee of the city council and trusted that there would be a liberal spirit exhibited towards the company by the city council.

On motion of Alderman Londoner, a committee of three was appointed to confer with the Denver Water Company.

The Mayor appointed as such a committee, Aldermen Londoner, Bailey and Bates.

On motion of Alderman Londoner, the council adjourned to meet on Thursday, December 1st, A. D. 1870, at 7 o'clock P. M.

Attest:

GEO. T. CLARK,
City Clerk.

(Copy.)

City Council Proceedings.

THURSDAY, *December 1st*, 1870.

Council met pursuant to adjournment.
Mayor in the chair.
Roll called.
Absent, none.
Journal of preceeding meeting read and approved.
356 Petition and proposition of the Denver City Water Company to supply the city with water, was read.
On motion of Alderman Bailey, the petition was received and ordered placed on file, and the subject matter of same was referred to the special committee on water with instructions to report at next meeting.
On motion of Alderman Bates, the council adjourned to meet on Thursday, Dec. 8th, A. D. 1870, at 7 o'clock P. M.

Attest:
GEO. T. CLARK,
City Clerk.

(Copy.)

City Council Proceedings.

THURSDAY, *December 8th*, 1870.

Council met pursuant to adjournment.
Mayor in the chair.
Roll called.
Absent none.
Journal of preceeding meeting read and approved.
The special committee to whom was referred the proposition of the Denver Water Company reported as follows:

To the Hon. Mayor & Council.

GENTLEMEN: Your committee to whom was referred the proposition of the Denver Water Company beg leave to report in favor of the same and would recommend that the Honorable Mayor be authorized to sign a contract with the said company upon the basis of the proposition submitted by their president with the following proviso, to-wit: That the city shall have the use of the fire plugs for the purpose of washing gutters and watering streets. All of which is respectfully submitted.

W. LONDONER,
I. E. BATES,
J. L. BAILEY,
Committee.

Alderman Maloney moved to adopt.

Alderman Wagner moved to amend by striking out the part relating to hydrants.

Ayes and Nays demanded.

357 Ayes Aldermen Wagner and Willoughby (2).

Nays Aldermen Bailey, Bates, Cramer, Force, Londoner, Maloney and Mr. Mayor. (7).

So the amendment was lost.

Ayes and Nays demanded on the original motion.

Ayes Aldermen Bailey, Bates, Cramer, Force, Londoner, Maloney and Mr. Mayor. (7).

Nays Aldermen Wagner and Willoughby (2).

So the report was adopted.

On motion of Alderman Willoughby the Council adjourned to meet on Thursday, Dec. 15th, A. D. 1870, at 7 o'clock p. m.

Attest:

GEO. T. CLARK,
City Clerk.

To the Hon. the mayor and city council of the city of Denver:

The Denver City Water Company by their president, makes the following proposition and agree- that if the same be accepted on the part of the city of Denver, it shall become a contract between the said company and the said city.

First. That the Denver City Water Company shall have the exclusive right to lay pipes for the distribution of water within the city limits and the additions made thereto.

Second. In consideration of said right the said company agrees to lay within one year from the date of this contract at least three miles of main distributing pipe within said city limits and supply the same with water, and extend the same to meet the demand as fast as possible.

Third. That said company agrees to erect hydrants on the line of the main pipe at all points that the City Council may direct, said city paying the actual cost therefor, to the said company. Said hydrants shall each furnish a supply of water for the use of the fire department of said city, not less in quantity than one stream forced through a nozzle one inch in diameter to a heighth of seventy-five feet above the grade of said city at the intersection of Larimer and F streets, and such supply shall be continuous, unless cut off by accident or casualty and in such event the said company shall make all reasonable effort to repair the same immediately.

Fourth. Said city shall pay said company, annually the sum of one hundred and fifty dollars for the use of each hydrant to be paid quarterly.

358 Fifth. Said company shall furnish water to the occupants of houses and other persons desiring the same along the lines of the water pipe for domestic and other purposes at rates not to exceed those charged by the city of St. Louis, in the state of Missouri, to its inhabitants.

Sixth. After the expiration of twenty years from the acceptance of this proposition the city may at their option purchase the water works of the said company, at a valuation to be fixed by five appraisers, two of whom shall be appointed by each party and the four when so appointed to appoint a fifth, any three of whom may fix said valuation.

JAMES ARCHER,
Prest. D. City Water Co.

Further the city shall have the care of the fire plugs for the purpose of washing gutters and watering streets.

(Copy.)

This agreement, made the sixteenth day of December in the year eighteen hundred and seventy between the city of Denver, in the territory of Colorado, by the mayor of said city of the first part, and the Denver City Water Company by their president of the second part, Witnesseth:

That for and in consideration of the agreements and covenants hereinafter mentioned to be made and performed by the party of the second part, the party of the first part doth hereby grant unto the said party of the second part the sole and exclusive right to lay pipes for the distribution of water within the city limits of said city of Denver and any additions that may hereafter be made thereto, and in consideration of said grant the said party of the second part hereby covenants and agrees to and with the party of the first part to lay within one year from the eighth day of December, A. D. 1870, at least three miles of main distributing pipe within said city limits and supply the same with water and to extend the same from time to time thereafter so as to meet the demand for the same as fast as possible, and the said party of the second part further covenants and agrees as aforesaid to erect hydrants on the line of said main pipe at all points that the said party of the first part may from time to time direct, said party of the first part paying the party of the second part therefor the actual cost of erecting the same, said hydrants each to furnish a supply of water for the use of the fire department of said city not less in quantity that one stream forced through a nozzle one inch in diameter to a height of seventy-five feet above the grade of said city at the intersection of Larimer and F streets, such supply to be continuous unless cut off by acci-
359 dent or casualty and in such event the party of the second part shall make all reasonable effort to repair the same immediately, and the party of the second part further covenants and agrees as aforesaid that the party of the first part shall have the free and uninterrupted use of the water from said hydrants or fire plugs for the purpose of washing gutters and watering streets. And the party of the first part hereby covenants and agrees to pay the party of the second part for the use of water from said hydrants as aforesaid the sum of one hundred and fifty dollars annually for each hydrant from the time the same are erected and ready for use

as aforesaid to be paid quarterly on the first days of January, April, July and October in each and every year. The party of the second part hereby covenants and agrees as aforesaid to furnish water to the occupants of houses and other persons along the line of the water pipes for domestic use and other purposes at rates not to exceed those charged by the city of St. Louis in the state of Missouri to its inhabitants. And it is further agreed by and between the parties to these presents that at the expiration of the term of twenty years from the said eighth day of December in the year eighteen hundred and seventy the said party of the first part may at their option purchase the said water works with its appurtenances from the party of the second part, yielding and paying therefor to the party of the second part such sum or sums of money to be determined by an appraised valuation of the same. Said valuation to be made by five disinterested persons as appraisers, two of whom shall be appointed by each of the parties to these presents and the four so appointed, shall appoint a fifth. Any three of whom when so appointed, agreeing may fix said valuation.

In Witness Whereof the said party of the first part have hereunto caused the common seal of the city of Denver to be affixed the day and year first above written.

[Seal, City of Denver.]

CITY OF DENVER,
By B. B. STILES, *Mayor.*

Attest:
GEO. T. CLARK,
City Clerk.

By the City Council Clerk and the party of the second part by the president of the Denver City Water Company have hereunto set their corporate seal by the hands of their president, and their president has hereunto subscribed his name the day and year first above written.

DENVER CITY WATER COMPANY,
By JAMES ARCHER, *President.*

(Denver City Water Co.)
(Corporate seal.)
(5c. Int. Revenue Stamp.)

360 EXHIBIT "B."

The Denver City Water Co. 1872-1874.

(Copy.)

City Council Proceedings.

DENVER, COLORADO, TERRITORY,
WEDNESDAY, *January* 10*th*, *A. D.* 1872.

Council met in special session pursuant to a call from the mayor.
Roll called.
Absent none.
The mayor stated *that* the object of the meeting to be to consider his action and to hear report of the special committee of conference with the Denver Water Company.
On motion of Alderman Clifford, the Denver City Water Company were requested to submit their terms in writing for the sale of the water works to the City Council.
Motion made to adjourn, and carried.

JOHN HARPER, *Mayor.*

Attest:
JAMES V. GRIFFIN,
City Clerk.

(Copy.)

DENVER, COLORADO TERRITORY,
FRIDAY, *January* 19", 1872.

City Council Proceedings.

Council met pursuant to adjournment.
Roll called. Absent Aldermen Maloney, Woeber and Mr. Mayor.
Quorum present: On motion of Alderman Bailey, Ald. Bates was appointed chairman pro-tem.
Journal of the two meetings of January 4 and of the meetings of January 5" 10" and 18" 1872, read and approved.
The following communication from the Denver Water Company was read.

To the Committee of the City Council:

361 The Denver Water Company proposes to modify their contract with the city of Denver so as to furnish water to be used for the extinguishment of fires only as follows:
1st for each hydrant $100. the city to take not less than one hydrant for each block or fractional block along the side or end of which a main distributing pipe of not less than six inches in diameter shall pass; $50. for each second hydrant on any block, and $30

for each third hydrant to the block. All hydrants to be of the same capacity as those heretofore erected. On behalf of the Denver City Water Company.

(Signed) JAMES ARCHER,
President.

On motion of Alderman Winne the communication was received and placed on file.

On motion of Alderman Clifford the City Attorney was instructed to draft and present to the legislature a bill so amending the city charter of the city of Denver as to authorize the city council to borrow money or to issue the bonds of the city of Denver in a sum not exceeding three hundred thousand dollars for the purpose of furnishing the city with water for fire and other purposes, and for the erection of public buildings provided that no such debt can be created or bonds issued until the question has been submitted to a vote of the people and ratified by two thirds of the voters.

On motion of Alderman Winne the council adjourned until Monday January 22" 1872, seven o'clock p. m.

Attest:
JAMES V. GRIFFIN,
City Clerk.

(Copy.)

DENVER, COLORADO TERRITORY,
MONDAY, *January* 22", 1872.

City Council Proceedings.

Council met pursuant to adjournment.
Mayor in the chair.
Roll called: Absent Alde-men Maloney & Winne.
Quorum present:
On motion of Alderman Bailey the reading of the journal of last meeting was dispensed with.

362 The following was read and on motion of Alderman Crocker, received and placed on file.

DENVER, COLORADO, *January* 22", 1872.

To the Hon. the mayor and common council of the city of Denver:

The trustees of this company beg respectfully to decline making any proposition for the sale of water works to the city. The unfinished condition in which the work on pipe laying etc. is, places it out of their power to meet your wishes. The trustees are all largely interested in the success of our city and if it is the wish of our people and they have the means to buy, the trustees will meet the representatives of the city in a cordial spirit and endeavor to make the transfer of the works when purchased at a fair price.

Very respectfully your obedient servant,
JAMES ARCHER.

On motion of Alderman Bailey the council adjourned, until Thursday February 1st, 1872, seven o'clock p. m.

JNO. HARPER, *Mayor.*

Attest:
JAMES V. GRIFFIN,
City Clerk.

(Copy.)

DENVER, COLORADO TERRITORY,
THURSDAY, *February* (1*st*), 1872.

City Council Proceedings.

Council met pursuant to adjournment.
Mayor in the chair.
Roll called: Absent Alderman Maloney.
Quorum present.
Journal of the meetings of January 19th and 22nd, 1872 read and approved.
Alderman Winne offered the following resolution:
Resolved that the city propose to contract with the Denver Water Company for one double hydrant to each block for the first fifteen miles of main pipe laid at $75 each per annum, said contract to be for two years said hydrants to be used for fire purposes and for washing streets alleys and gutters upon such days of each
363 week as may be agreed to; and that a committee of five be appointed to wait upon the president of the company with this proposition and report back to the council.
The chair appointed as such committee Aldermen Winne, Clifford, Crocker, Bates and Woeber. And the council took a recess.
The committee waited upon the president of the Water Company and informed him of the action of the council.
Upon the reassembling of the council the committee presented the following communication which was received.

DENVER, COLORADO, *February* 1*st*, 1872.

The Hon. the Mayor of Denver and city council:

The President of the Denver Water Company respectfully states he has been honored by receiving a committee from your honorable body and requests that the verbal communication presented by them be reduced to writing and he will submit the same to the members of the company and will return an answer tomorrow before 6 p. m.

Respectfully yours,
(Signed) JAMES ARCHER,
President.

On motion of Alderman Crocker the council adjourned to Friday, February 2nd, 1872, at 7 o'clock p. m.

JNO. HARPER, *Mayor.*

Attest:
JAMES V. GRIDDIN,
City Clerk.

(Copy.)

DENVER, COLORADO TERRITORY,
FEBRUARY 2ND, 1872.

City Council Proceedings.

Council met pursuant to adjournment.
Mayor in the chair.
Roll called: Absent Alderman Maloney.
Quorum present.
The following communication from the Denver City Water Company was read.

364 OFFICE DENVER WATER COMPANY,
DENVER, COLO., *February* 2", 1872.

The Hon. the Mayor of the city of Denver, and the Honorable the city council.

SIRS: In answer to your proposition of the 1st instant, the Denver Water Company propose for the term of two years from and after this date, to make a discount of fifty per cent from the original contract price, under date of December 16th, 1870, made by this company with the city of Denver; for a supply of water for hydrants for fire purposes; provided the city of Denver will take one hydrant for each and every block reached by a main distributing pipe of six inches or more in diameter for the first fifteen miles of pipe laid by this company; said hydrants to be single or double, as may be designated by the city council of the city of Denver, the said hydrants to be used only for fire purposes; and further, the city to pay for each and every hydrant beginning from the date at which the company are prepared to furnish a regular supply of water for the same.

Very respectfully, your obedient servants,

(Signed) JAMES ARCHER,
President.
E. M. McCOOK,
Vice-Pres't.
D. H. MOFFAT, JR.,
Treasurer.
R. R. McCORMICK,
Secretary.

D. WITTER,
E. F. HALLACK,
F. Z. SALOMON,
Trustees.

Alderman Winne moved that the chair appoint a committee of three to confer with the Denver Water Company and at the next meeting report a contract with said company for one hydrant to each block on fifteen miles of pipe.

The motion was adopted.

The chair appointed Aldermen Winne, Clifford and Crocker as said committee.

Alderman Bailey offered the following:

Resolved that the mayor is hereby instructed as soon as a contract is concluded with the Denver Water Company to purchase 2,000 feet of rubber hose to be of a first class quality; also three four wheeled hose carriages for use of the city.

The resolution was adopted.

365 On motion of Alderman Willoughby the council adjourned until Monday, February 5" 1872, seven o'clock P. M.

JNO. HARPER, *Mayor.*

Attest:

JAMES V. GRIFFIN,
City Clerk.

(Copy.)

City Council Proceedings.

FEBRUARY 5TH, 1872.

Council met pursuant to adjournment.

Mayor in the chair.

Roll called: Absent Alderman Maloney.

Quorum present.

The mayor stated that the special committee appointed to report a contract to the city council with the Denver Water Company were not yet prepared to report and recommended adjournment until tomorrow.

On motion of Alderman Crocker, the council adjourned until Tuesday, February 6th, 1872, four o'clock p. m.

JNO. HARPER, *Mayor.*

Attest:

JAMES V. GRIFFIN,
City Clerk.

(Copy.)

City Council Proceedings.

DENVER, COLORADO TERRITORY,
February 6th, 1872.

Council met pursuant to adjournment.

Mayor in the chair.

Roll called. Absent Alderman Maloney.

The special committee appointed February 2"^ 1872 to confer with the Denver City Water Company and report a contract with said company submitted the following through the city attorney.

Agreement.

This agreement made and entered into this sixth day of February, A. D. 1872 by and between the Denver city Water Company
366 a corporation organized under the laws of the territory of Colorado and the city of Denver a municipal corporation of said territory—

Witnesseth: That the said Denver City Water Company for and in considerations of the promises and agreements by the said city of Denver, to be kept and performed as hereinafter specified on its part, promises and agrees to furnish the City of Denver with water for *the* fire purposes for two years from and after this date, upon the following terms to-wit, for the compensation of seventy-five dollars per hydrant for each year, each hydrant to be paid for by the city of Denver at that rate from and after the time that each hydrant is completed and ready for use.

The water company also agree that the city of Denver by and through its city council, may elect that said hydrants be single or double or a part of the number single and the balance double; provided, that after such election is made that the same shall not be changed except by agreement with the Denver City Water company. And the said city of Denver, by the resolution of the City Council of the date of February sixth A. D. 1872, in consideration of the promises on its part promises and agrees that it will take and pay for at the above specified price a number of hydrants equal to one hydrant for each block of lots in said city that may be reached by the distributing pipe of said Water Company for the first fifteen miles of pipe laid by said company; it being understood that said hydrants may be located wherever the said city council may elect so that the entire number shall be equal to the number aforesaid; each hydrant to be paid for at the rate aforesaid from and after the time the same is completed, supplied with water and ready for use as aforesaid; it being expressly agreed and understood by the parties hereto that this agreement nor the proceedings under it shall be construc*t*ed to be a designation nor direction of hydrants under any former contract, but shall in all respects cease and terminate at the expiration of two years from this date. The actual expense and costs of putting in said hydrants is to be paid by the city of Denver, and the same are to be the property of said city at the expiration of this contract; and said Denver City Water Company may at any time after the expiration of the time limited herein, by its laborers, servants and employees, in any reasonable manner, enter upon the streets of the city of Denver or any of them and by excavation or otherwise sever the connection between the pipes of the Denver City Water Company and the said hydrants. In determining the number of hydrants to be taken by the city of Denver under this
367 agreement all of the pipe of the said Denver City Water Company running along or across any and all of the streets of whatever size said pipe may be, is to be calculated in making up the first fifteen miles above referred to. And it is further expressly

agreed and understood between the parties hereto that this agreement shall not be construed to be a substitute for a written instrument dated December sixteenth 1870 between the parties hereto nor to annul or ratify, or in any manner effect said written instrument, but the same shall be construed in every respect as though this contract had not been made.

In witness whereof the said party- of the first part, by the president of the Denver City Water Company have hereunto set their corporate seal by the hands of their president, and their president has hereunto subscribed his name the day and year first above written.

DENVER CITY WATER COMPANY,
(Signed) By JAMES ARCHER, *President.*

[L. S.] Attest:
(Signed) R. R. McCORMICK, *Sec.*

And the party- of the second part have caused the common seal of the city to be affixed the day and year first above written.

[L. S.] THE CITY OF DENVER,
By JOHN HARPER, *Mayor.*

Attest:
JAMES V. GRIFFIN,
City Clerk.

Alderman Crocker offered the following:

Resolved, That the contract between the Denver City Water Company and the city of Denver this day reported by the city attorney bearing date February sixth 1872 providing for supplying the city of Denver with water for fire purposes for two years from this date be approved and that the mayor be authorized to sign the same on the part of the city and to affix the seal of the city thereto.

Ayes and Nays demanded on the adoption of the resolution.

Ayes: Aldermen Bailey, Bates, Crocker, Winne, Willoughby, Woeber and Mr. Mayor 7.

Nays: Alderman Clifford 1.

So the resolution was adopted.

368 On motion *of* the council adjourned until Thursday, February 15th A. D. 1872 seven o'clock p. m.

JNO. HARPER, *Mayor.*

Attest:
JAMES V. GRIFFIN,
City Clerk.

(Copy.)

City Council Proceedings.

CITY COUNCIL CHAMBER,
DENVER, C. T., *April* 13, 1874.

Council met pursuant to adjournment.
His Honor the Mayor in the chair.
Roll called. All the members present except Alderman Maloney.
Minutes of April 8 read and approved.
Alderman McCune moved that a special committee of 3 in connection with the mayor be appointed to wait upon the Holly Water Company and ascertain what proposition they have to offer for furnishing water for the following year. Carried.
Aldermen McCune, Wilson and Williams were appointed as such committee.
On motion the city council adjourned till next Thursday evening, April 16/74.

WM. J. BARKER, *Mayor.*

Attest:
C. F. LEIMER,
City Clerk.

(Copy.)

Proceedings of the City Council.

DENVER, COLORADO, *April* 16, 1874.

Council met pursuant to adjournment.
Roll called.
All members present except Aldermen Maloney, Williams & Baker.
Minutes of the last two meetings read and approved.
Alderman McCune, Chairman of a select committee to see the officers of the Water Company and ascertain what proposition
369 said company might offer for the ensuing year, reported that the president of said water company was absent from the city and that there were no representatives who had authority to make any proposition; but that Mr. Arther would soon return and that there was a possibility of a satisfactory arrangement being perfected.
Adjourned for one week.

WM. J. BARKER, *Mayor.*

Attest:
C. F. LEIMER,
City Clerk.

(Copy.)

Proceedings of the City Council.

DENVER, COLORADO, *April* 23, 1874.

Council met pursuant to adjournment.

His Honor the mayor in the chair.

Roll called.

Present: All the members of the council except Alderman Maloney.

The Minutes of last meeting were read and approved.

Alderman McCune from the special committee appointed to confer with the Water Company respecting the supply of water for the ensuing year, stated that he had no opportunity as yet of holding a conference with said company. Further time was granted the committee for such purpose. On motion of Alderman McCune the council adjourned to next Tuesday night, April 28th, 1874.

WM. J. BARKER, *Mayor.*

Attest:

C. F. LEIMER,
City Clerk.

(Copy.)

Proceedings of the City Council.

DENVER, COLO., THURSDAY, *April 30th,* 1874.

Council met pursuant to adjournment.

The mayor in the chair.

Roll called.

Present: Ald. Anderson, Baker, Wilson, McCune, Clark, McLellan, Whitehead.

Absent: Aldermen Maloney, Williams, Webb and Zang.

370 Minutes of last regular meeting read and approved.

Alderman McCune from the special committee appointed to confer with the Holly Water Company reported verbally that they had seen Mr. Archer and had offered the sum of $15000.00 per year for five years to the said company for water for fire purposes and that they had afterwards received the following communication in reply.

DENVER, *April* 29, 1874.

To His Hon. the Mayor and City Council of Denver.

GENTLEMEN: Your proposition for water for fire purposes received. We cannot consider the same. We will furnish water for fire and other purposes as designated under the original contract to the city of Denver under date of December, 1870, or we will at this time arbitrate and sell the works to the city instead of waiting for the expiration of the twenty years as stipulated in the original contract by order of the Board of trustees.

Respectfully,

(Signed) JAMES ARCHER,
President Denver City Water Company.

The committee then presented the following resolution:

Whereas the contract entered into between the city of Denver of the one part and the Denver City Water Company of the other part on the 6th day of February, A. D. 1872, has expired and whereas by the provision of the contract made with the said water company, dated December 16th, 1870, it is provided that the said water company should erect hydrants at such points as the city council might from time to time direct;

Therefore, be it Resolved by the City Council of the city of Denver.

First. That we do hereby direct the Denver City Water Co. to erect hydrants at the following designated points as follows:

One	double	hydrant	at	the	corner	of 15th and Wazee	Streets
One	do.	do.	do.	do.	do.	15th & Larimer	do.
One	do.	do.		do.	do.	16th & Holliday	do.
One	do.	do.		do.	do.	17 & Lawrence	do.
One	do.	do.		do.	do.	13th & Holliday	do.
One	do.	do.		do.	do.	10th & Lawrence	do.
One	do.	do.		do.	do.	15th & Curtis	do.
One	do.	do.		do.	do.	19th & Champa	do.
One	do.	do.		do.	do.	19th & Blake	do.
One	do.	do.		do.	do.	17th & Welton	do.

371 and that the said city will not pay for any hydrants at other points than those above designated.

Second. That the Denver City Water Company be requested to cut or turn the water off from all other hydrants within the city than those above designated.

Third. That the City Clerk serve a copy of these resolutions forthwith upon the president of the Denver City Water Co., and also upon the chief engineer of the fire department of the city of Denver.

Special Committee,

A. McCUNE.
J. K. WILSON.
A. J. WILLIAMS.
W. J. BARKER.

Alderman McCune moved the adoption of the resolutions. The motion being seconded Alderman Wilson made some lengthy remarks concerning the same. He desired that every member of the council should give a free expression of his views upon this question and then detailed his conversation with Mr. Archer from which he inferred that no suitable contract could possibly be made with the water company as they were desirous forcing upon this city a monopoly that would be exceedingly oppressive, the citizens of Denver and C. He *he* concluded by saying that he for one was willing to assume the responsibility, grave as it is, of taking steps immediately towards the erection of water works by the city rather than submit

to the *exorbinate* demands of the Holly Company. Aldermen Anderson, Whitehead, Webb, McCune and Clark spoke in endorsement of the views of Mr. Wilson. Alderman McLellan called upon the attorney for an opinion as to the rights or claims of the Holly Company whether they had the exclusive right to lay pipes in the city &c.

The city attorney in reply stated in substance that he believed they had no legal claim to any exclusive right for said purpose and that if they claimed such rights under and by authority of any former city council, such claims would be illegal because the council of the city of Denver had never been delegated with such powers by the Legislature and without a provision in the charter authorizing the council to grant exclusive rights as it is claimed has been granted to the Holly Company, any action such council might have taken, would be declared null and void when brought into court.

Alderman McLellan, Baker and Hawes then stated that the resolution met their hearty endorsement.

On the call of question the resolution was unanimously adopted.

372 On motion of Alderman Wilson the council adjourned for one week.

WM. J. BARKER, *Mayor.*

Attest:
C. F. LEIMER,
City Clerk.

(Copy.)

Proceedings of the City Council.

DENVER, COLO., *May 7th,* 1874.

Council met pursuant to adjournment.
Roll called. His Honor the Mayor in the chair.
All present except Aldermen Maloney and Zang.
Minutes of the previous meeting read and approved.

The special committee on the Holly Water Contract matter presented a supplementary contract drawn by Mr. Archer; the same was read and referred back on motion of Alderman Williams to the said committee together with the city attorney with instructions to make certain amendments thereto and report at the next meeting of the council.

On a motion the council adjourned to Friday, May 8th, 1874.

WM. J. BARKER, *Mayor.*

Attest:
C. F. LEIMER,
City Clerk.

(Copy.)

Proceedings of the City Council.

DENVER, COLORADO, *Friday, May 8th,* 1874.

The council met pursuant to adjournment.

Roll called. The mayor in the chair.

Absent: Aldermen Maloney, Hawes and Zang.

The contract proposed to be entered into with the Holly Water Company was read, and after discussion the following resolution was offered.

"Resolved, That the matter be referred back to the select committee to close a contract, and that the mayor be authorized to sign the same.

(Signed) H. C. CLARK.

On motion the same was adopted.

373 On motion the council adjourned until next Thursday evening, May 14th, at 7:30 o'clock.

WM. J. BARKER, *Mayor.*

Attest:

C. F. LEIMER,
City Clerk.

Contract with the City of Denver.

This agreement, made this ninth day of May, A. D. one thousand eight hundred and seventy-four, between the city of Denver, a municipal corporation, organized under and by virtue of an act of the legislature of the territory of Colorado, by the mayor of said city, of the first part, and the Denver City Water Company, by their president, of the second part.

Witnesseth: That for and in consideration of the covenant and agreements hereinafter mentioned, to be done and performed by the party of the second part, the party of the first part doth hereby grant unto the party of the second part, the sole and exclusive right to lay pipes for the distribution of water within the city limits of the said city of Denver, and any additions that may hereafter be made thereto, for the period of seventeen years from the date of this agreement and in consideration of said grant, and other considerations hereinafter mentioned, the said party of the second part hereby covenants and agrees to and with the said party of the first part, to lay, each and every year during the continuance of this agreement, in and along the streets of the said city of Denver, one and one-half miles of main distributing pipes, in addition to the pipes now in use in the said city, the said pipes not to be less than five inches in diameter, and to supply the same with water; and that in measuring the said one and one-half miles of pipe to

be laid each year, as aforesaid, no pipe shall be measured or estimated on more than two sides of any one square or block, nor shall any pipes be measured, in estimating the said one and one-half miles of pipe, within the limits of any water pipe now laid in said city; and that the said one and one-half miles of pipe to be laid annually, as aforesaid, shall be laid along those streets where it will afford protection from fire to the greatest number of inhabitants, and shall be laid outside of the limits above mentioned.

And the said party of the second part further covenants and agrees with the said party of the first part, to erect hydrants on the line of any of the pipes now laid or hereafter to be laid by the said party of the second part in the said city, at all points where the said party of the first part may from time to time direct, said party of the first part paying to said party of the second part there-
374 for the actual cost of erecting the same; said hydrants each to furnish a supply of water for the use of the fire department of said city, not less in quantity than one stream forced through a nozzle one inch in diameter to a height of sixty feet above the grade of any street whereon the hydrant with which such nozzle is connected is erected, and at the point of such street whereon such hydrant is erected, such supply to be continuous, unless cut off by accident or casualty; and in such event the party of the second part shall make all reasonable effort to repair the same immediately.

And the party of the second part further covenants and agrees that the party of the first part shall have the free and uninterrupted use of the water from said hydrants or fire plugs, for the extinguishment of fires and the use of the fire department, and the purpose of washing gutters and watering streets.

And the party of the first part hereby covenants and agrees to pay the said party of the second part, for the use of water from said hydrants, as aforesaid, the sum of twenty thousand dollars ($20,000) per year, for the period of seventeen years from the date hereof, to be paid semi-annually, on the first days of June and Dec. of each and every of the said seventeen years.

The party of the second part further covenants and agrees, as aforesaid, to furnish water to the occupants of houses, and to other persons along the line of the water pipes, for domestic use and other purposes, at rates not to exceed those charged by the city of St. Louis in the state of Missouri, to its inhabitants.

And it is further agreed, by and between the parties to these presents, that at the expiration of five years from the date hereof, or at the expiration of ten years from the date hereof, or at the expiration of the said term of seventeen years from the date hereof, the said party of the first part may, at their option, purchase the said water works with its appurtenances, from the party of the second part, yielding and paying therefor to the party of the second part such sum or sums of money to be determined by an appraised valuation of the same, said valuation of the same to be made by five disinterested appraisers, two of whom shall be ap-

pointed by each of the parties to these presents, and the four so appointed shall appoint the fifth, any three of whom, when so appointed, may fix said valuation.

And it is Further Agreed, by and between the parties to these presents, that during the continuance of this contract, the
375 said party of the second part shall furnish as good a quality of water for domestic purposes as it has heretofore done and is now doing, and that the present and future purity of said water may be determined, it is hereby stipulated that there shall be an analysis of the water as now furnished by competent persons, which analysis shall be signed by the parties to this agreement, and spread of record upon the records of the said city of Denver, and which analysis shall be taken as the standard of all future tests.

And it is further agreed, that all contracts heretofore entered into between the parties to these presents are hereby absolutely annulled and held for naught, and that if the party of the second part shall fail to perform either or every of the acts incumbent on *him* by these presents, and at the time and in the manner herein specified, then this and all previous contracts between the parties to these *to these* presents shall be void.

This agreement to be in force from and after the first day of May, one thousand eight hundred and seventy-four.

In Witness, Whereof, the said party of the first part have hereunto caused the common seal of the city of Denver to be affixed, the day and year first above written.

CITY OF DENVER,
By WILLIAM J. BARKER, *Mayor.*

(City of Denver, Colorado, incorporated, November 7, 1861.)

Attest:
CHARLES F. LEIMER,
Chief Clerk.

And the party of the second part, by the president of the Denver City Water Company, have hereto set their corporate seal, by the hands of their president, and their president has hereunto subscribed his name the day and year first above written.

(Signed) DENVER CITY WATER COMPANY,
By JAMES ARCHER, *President.*

(Denver City Water Company.)

Attest:
R. R. McCORMICK, *Secretary.*

EXHIBIT C.

By Authority.

Ordinance No. 54, Series 1894.

376 Aldermanic Bill No. 65, Introduced by Alderman Philips.

A Bill for an Ordinance Leasing the Water Pipes, Mains, Hydrants and Pumping Machinery of the Water System Formerly Belonging to the Town of South Denver, to the Denver Union Water Company.

Be it enacted by the City Council of the city of Denver:

Section I.

Whereas, the city of Denver is now the owner of the water pipes, mains, hydrants and pumping machinery, situate in and belonging to the town of South Denver at the time of the annexation of said town to the city of Denver; and,

Whereas, on account of the insufficiency and impurity of said town's supply of water, the said town had for sometime previous to its annexation to the city of Denver purchased all its water supply from the Citizens Water company, and the said city of Denver has continued such purchase up to the present time; and,

Whereas, the Denver Union Water company, a corporation organized under the laws of the state of Colorado, is the successor of the said the Citizens Water company, and the owner of its plant and source of water supply; and,

Whereas, the city of Denver is now operating said water system at a loss, and it is therefore deemed for the best interests of the city of Denver that the pipes, mains, hydrants, and pumping machinery of said water system be leased to the said the Denver Union Water company, to be operated and maintained by said company, with the right to said company to collect water rents;

Now, therefore, the city of Denver hereby leases and demises unto the said the Denver Union Water company, all of the pipes mains, hydrants and pumping machinery formerly belonging to the town of South Denver, for and until the tenth (10) day of April, A. D. 1910, but expressly excluding from this lease any and all real estate, ditches and water rights formerly belonging to said water system; and the said the Denver Union Water company, in consideration of the leasing of said pipes, mains, hydrants and pumping machinery, by the said city of Denver to the said the Denver Union Water company, doth covenant and agree with the said city of Denver to pay to the said city of Denver as rent for the said pipes, mains, hydrants and pumping machinery, per annum, the sum of six per cent. upon the appraised value thereof.

And it is agreed that such appraisement shall be made by five

persons, two of whom are to be selected by the said the Denver Union Water company, two to be selected by the said city of Denver,
377 and the four thus chosen to select a fifth appraiser, and the appraised value of said pipes, mains, hydrants and pumping machinery fixed by a majority of said appraisers to be conclusive.

Section II.

The Denver Union Water company shall furnish the inhabitants of the territory formerly known as South Denver with a water pressure which shall not be less than thirty-five (35) pounds to the square inch at the high point of Evans avenue and South Detroit street, in University Park.

The said the Denver Union Water company shall also place in the streets, avenues, alleys and public places of the territory formerly known as the town of South Denver, and at such other points as may be necessary, at its own cost, such pipes, mains, valves and machinery as may be necessary to give an adequate supply of water to the inhabitants of said territory, and lay and maintain such additional pipes, mains, valves and machinery therein as may be necessary.

All new construction made by said the Denver Union Water company during the existence of this lease shall be approved by the city engineer of the city of Denver before the commencement of such work.

Section III.

Upon the termination of said lease, either by expiration of the time of the said lease or otherwise, all new construction made by the Denver Union Water company, its successors and assigns, during the continuance of this lease, shall be appraised by five appraisers, two of whom are to be selected by the Denver Union Water company, two to be selected by the city of Denver, and the four thus chosen to select the fifth appraiser, and the value of such new construction so fixed by a majority of such appraisers to be conclusive; and the city of Denver may pay to the said the Denver Union Water company, it- successors and assigns, upon the termination of this lease, the value of such new construction made by the Denver Union Water company during the existence of said lease if the said city of Denver, before such appraisement is made, elects to purchase such new construction. In the event of the city of Denver concluding not to purchase such new construction then the Denver Union Water company, its successors and assigns, shall purchase the pipes and mains of the city of Denver then being in the streets, avenues and alleys in the territory formerly known as the town of South Denver, at the appraised value thereof; and in such event the city of Denver shall select two appraisers, and the Denver Union Water company shall select two appraisers, and the four thus
378 chosen shall select a fifth appraiser, and the value of said pipes and mains so fixed by a majority of said appraisers to be conclusive; and the said the Denver Union Water company shall within sixty days after the appraising of said pipes, mains, hydrants and pumping machinery, pay such appraised value to the

city of Denver, and receive from said city of Denver a conveyance of such pipes and mains, and the city of Denver within the sixty days of the said last named appraisement to grant to said the Denver Union Water company, its successors or assigns, a franchise to operate and maintain said plant and water system in the said Territory of South Denver upon the same terms specified in ordinance No. 44 of the series of 1890 of the city of Denver, the rates to be charged under such ordinance or franchise to be the same as charged during the term of such franchise in other portions of the city of Denver, and any restrictions, limitations and conditions that may be imposed upon the said the Denver Union Water company, its successors or assigns, at that time, shall apply equally and be made a part of the franchise proposed to be granted in said territory.

Section IV.

The said the Denver Union Water company during the continuance of this lease shall charge and collect from the city of Denver and the inhabitants of the territory formerly known as the town of South Denver the same price and rates for water as are charged by said company in the other portions of the city of Denver.

Section V.

The rent for said pipes, mains, hydrants and pumping machinery during the continuance of this lease shall be paid by the Denver Union Water company to the city of Denver in semi-annual payments on the first day of May and November of each year.

Section VI.

The Denver Union Water Company, during the continuance of this lease, shall supply the inhabitants of the territory formerly known as the town of South Denver with the same quality of water as is furnished to the inhabitants of other portions of the city of Denver, and in no event shall said company at any time use or pump any water from the old source of supply of said South Denver water system.

Section VII.

If the rent above provided for shall be behind or unpaid for thirty days after the day whereon the same ought to be paid, or if default shall be made in any of the covenants or agreements herein contained, to be kept by the Denver Union Water company,
379 its successors and assigns, it shall and may be lawful for the city of Denver, its successors and assigns, to declare said term ended, and to take possession of said pipes, mains, hydrants and pumping machinery. And if, at any time, said term shall be ended or determined at such election, the said the Denver Union Water company covenants and agrees to surrender and yield up said pipes, mains, hydrants and pumping machinery to the city of Denver immediately upon the termination of said term, as aforesaid.

Section VIII.

This ordinance shall become a binding contract between the city of Denver and the Denver Union Water company, its successors and assigns, when accepted by the Denver Union Water company within thirty days after the final passage hereof, with a release to the city of Denver of all liability which might arise by reason of not carrying out ordinance No. 113 of the town of South Denver, passed and approved January 29, 1894.

All ordinances conflicting with this ordinance are hereby repealed.

LOUIS F. BARTELS,
President Pro Tem. of the Board of Aldermen.
C. L. BURPEE,
President Pro Tem. of the Board of Supervisors.

Signed and approved by me this 15th day of December, 1894.

M. D. VAN HORN,
Mayor of the City of Denver.

Attested by the undersigned, with the corporate seal of the city of Denver this 17th day of December, 1894.

[SEAL.] J. J. VICK ROY,
City Clerk.

Published in The Denver Republican this 18th day of December, A. D. 1894.

EXHIBIT D.

MARCH 3, 1908.

Hon. R. W. Speer, Mayor of the city and county, city hall, Denver, Colo.

DEAR SIR: The contract now in force between the city and county of Denver and the Denver Union Water company is officially styled ordinance No. 44 of the series of 1890. It bears date April 10 of that year and was executed between the city of Denver, of
380 the one part, and the Denver Water company of the other. The City and County of Denver, by virtue of article 20 of the constitution, and the Denver Union Water company, as assignee of the Denver Water company, are respectively the parties to the agreement.

City Contract with Company also an Ordinance of Denver.

This contract is also an ordinance. Section 1 grants 'the right and privilege of laying down, continuing and maintaining water pipes, valves, hydrants and apparatus for the conveyance and distribution of water in, upon along and through the streets and avenues and all extensions thereof as therein named, to the Denver Water company, its successors and assigns, to such extent as the city may lawfully grant the same, subject to be terminated in the manner hereinafter in this ordinance provided.'

By section 2 the city agrees that thereafter whenever requested to do so it shall make a grant to such extent as it lawfully may to the said company of the same rights mentioned in section 1 upon any streets thereafter laid out or extended, and also such additional and confirmatory grants to the said company and its successors and assigns with the rights and privileges mentioned in section 1, such additional and confirmatory grants to be subject to termination in the manner in the ordinance thereinafter specified.

By sections 4 and 5 the company agrees to furnish water to private consumers under rules and rates therein referred to. Section 6 fixes the quality of water to be furnished for public and private consumption. Sections 7 and 8 refer to hydrant service, and section 10 relates to compensation from the city. Section 11 gives the city the right of election on April 10, 1910, to purchase the water works, while section 12 reserves to the city the right to 'renew the contract hereby made' at its election and at a reduced rate for hydrants.

Section 21 recites that 'while the consideration for the respective agreements of the city and county are upon each side the several agreements of the other, all of the several grants, contracts and agreements in this ordinance contained are to be deemed independent agreements with the same force and effect as if each section of this ordinance was contained in a separate ordinance by itself.' This ordinance was passed by the city council, vetoed by the mayor, and then passed over the veto by the requisite majority.

Each Section an Ordinance and Agreement by Itself.

You will perceive that the last section practically converts each separate section into a separate ordinance and makes inde-
381 pendent agreements of the several grants and contracts therein contained. A construction of the document therefore necessitates the consideration of every grant or agreement as though standing by itself without reference to the others except insofar as reference by one section in another may connect them.

The rights and privileges granted by sections 1 and 2 are absolute, far reaching and unconditional. They can be terminated only in the manner provided by the ordinance, but the ordinance provides no right or method of termination other than the election by the city to purchase the works under the provisions of section 11. This impression is confirmed by the recitals of section 20, which provide that all apparatus then owned or thereafter laid in or set in or upon any streets, alleys or other public places, shall be and remain the sole and absolute property of the water company, its successors and assigns 'which shall forever be considered and entitled to be in possession thereof, except in case of purchase by said city under the terms of this ordinance or some agreement between the said city and said company, its successors or assigns, in and to the subject-matter hereof, shall vest in said city.' It would seem to follow that if on April 10, 1910, the city should decline to affirmatively exercise its election to purchase the rights and privileges granted under said ordinance, the latter would not be terminated

unless the city and the company under section 20 could ar-ive at some agreement between themselves.

But the power of termination in such event would rest entirely with the company, whose assent to any arrangement would be imperative and therefore subject to such terms as it might impose.

City Obliged to Pay Whatever Arbitrators May Agree Upon.

It will be noted also that if the city should elect under section 11 to purchase the waterworks, that election concludes it. By such election the contract of purchase is made. The subsequent ascertainment of value is merely a detail. The board of arbitrators must be chosen and the city is obliged to pay the company and the company is obliged to receive whatever sum may be awarded as the valuation. In other words, the election once made, the city could not if it would recede from its contract, however exorbitant the valuation might be.

But the city may, on April 10, 1910, under section 12 elect to 'renew the contract hereby made.' What contract? Section
382 21 mentions several grants, contracts and agreements. It also declares each of them to be separate and independent. The context of the 12th section would indicate that the contract which the city may renew is that for supplying water to the municipality and possibly for fixing rates to private consumers. It may 'renew' that is, it may continue the existing arrangement, subject only to a reduction of 10 per cent. on hydrant rentals. The 'renewal' of a contract is in one sense a new agreement; it is actually the continuation or extension of an old one. The term 'renew' was advisedly placed in the ordinance. Its meaning is obvious. The city may continue the existing condititions, but it cannot change them except as to hydrant rentals.

If we suppose that the city and county of Denver on April 10, 1910, declines to exercise its election either to purchase the waterworks or to 'renew' the contract for water supply, what then will be the relation of the water company to the city and county? I do not perceive that its powers and privileges are in any wise changed. I find nothing in the ordinance to justify the conclusion that any covenants will have been terminated by lapse of time except as to the rates for hydrant rentals and dates of payments by the city to the company under section 10, and its obligation under section 14 to furnish the city water free of charge for city hall, fire department houses and for flushing and sprinkling purposes. On the other hand, if the city declines to purchase at the time indicated, its right to do so under the ordinance is gone. Should it also decline to renew the contract for water service, the latter would probably continue subject to the possible execution of some new agreement therefor, which if made, would be entirely independent of the ordinance itself.

Most Shrewdly Drawn to Safeguard Company Rights.

The views above expressed are those of first impression. A critical and exhaustive examination of the ordinance might not justify them.

However this may be, I can safely affirm that ordinance No. 44 is one of the most shrewdly drawn, carefully prepared and thoroughly effective instruments for the creation, continuance and safeguarding of private rights and privileges I have ever seen. It is difficult to suggest its possible improvement for such purposes. It practically stripped the city of every safeguard, and the right of election to purchase, which is grudgingly given, rigidly binds it to
383 & 384 the bargain however extortionate the price may be. I am informed that at the time the ordinance was adopted the most strenuous efforts were made to eliminate this solitary protective feature.

It is needless to add that the appraisement procedure for the purchase of the plant contained in the ordinance of Sept. 17, 1907, whereby the award of the appraisers is not conclusive but wholly subject to the approval of the popular vote, is far preferable to the scheme of purchase outlined in the previous contract, and that the interests of the city are best conserved by determining the question of values of the company's water system in advance of the 10th day of April, 1910.

Very respectfully yours,

C. S. THOMAS.

385 EXHIBIT "E."

Report of the Public Utilities Commission (Abridged) on the Value of the Old Plant and the Construction of a New One.

$7,319,503 will build a New Plant. Present Water Supply the Property of the City and cannot be diverted to other Uses.

Water Company has no Title to Water used by Others.

Additional Supply for Future Use can be easily obtained at Reasonable Price for a Million Population.

Old System worth less than $6,405,000.

Value estimated by Water Company's Appraisers Erroneous.

A New, Up-to-Date, Modern Plant with more than the Capacity of the Present Plant can be Constructed for Less than One-Half the Price Demanded by the Water Company for its Antiquated, Inefficient Plant.

Under Charter Amendment Section 264-*a* adopted by the people of the City and County of Denver, on May 17, 1910, the undersigned were made members of a Public Utilities Commission, created by this Amendment, "to have complete charge and control" of "the acquisition or operation of a proposed water works system for the City and County of Denver, and its inhabitants."

After defining the duties, powers and limitations of said Committee, the amendment proceeds to provide for an election by the people to decide for or against the issuance of bonds to the amount of $8,000,000 for either the purchase of the water works system of the Denver Union Water Co. for $7,000,000 in bonds, the remaining

$1,000,000 to be used in repairs and extension of the system, and in case of the refusal of this offer by said Company, then the total issue of $8,000,000 may be utilized in the construction of a new municipal water plant.

Offer Made to and Rejected by the Denver Union Water Co.

Immediately after the election of this Commission, to-wit, on May 31, 1910, we duly tendered $7,000,000 of said bonds, at par, as in said Section 264-*a* contemplated, to the Denver Union Water Co., and said tender was thereafter, by letter of said the Denver Union Water Co., of date June 9, 1910, rejected and refused.

In order, however, to fully cover the ground in this matter, upon August 12, 1910, we addressed and delivered to the Continental Trust Co., of Denver, a letter citing the provisions of the Charter Amendment relating to the contemplated acceptance of such offer by the Denver Union Water Company, and inquiring "whether the Denver Union Water Co. has complied, or has failed or refused to fully comply with all the foregoing provisions as to the things to be done and performed by it."

On August 13, 1910, we received a reply from the Continental Trust Co., stating that the Water Company had failed to comply with the Charter requirements.

In view of the above described facts, the Commission certified to the Election Commission of the City and County of Denver, that the Water Company had failed to accept the offer and that we had no alternative proposition to be voted upon.

Investigation of the Value of the Plant of the Denver Union Water Company.

The Charter Amendment provides that "the said Commission shall immediately upon its election, in case the Denver Union Water Company has not accepted the $7,000,000 in bonds for its plant aforesaid, proceed to make a careful investigation of the value of said plant for the uses and purposes of the City and County of Denver and its inhabitants."

For the purpose of enabling the Commission to comply with this requirement we addressed a letter, under date of June 25th, asking for information along certain lines.

This information was refused under date of July 1, 1910.

Soon after this time, to-wit: on July 21st, 1910, we employed, as consulting engineer, Mr. Hiram Phillips, formerly president of the Board of Public Improvements, St. Louis, Mo., and now practicing consulting engineer, regarding water works systems, and immediately thereafter, under date of July 22, 1910, we addressed another communication to the Denver Union Water Company, again asking for information, and this request also was denied.

Being still desirous of obtaining all the information possible regarding the present condition and value of the plant of the Denver Union Water Co., Mr. Phillips called upon the General Manager of the said Company, and stated to him that he had been directed to

make an impartial investigation and report concerning the present value of the existing plant and to assist in the compilation of estimates regarding the cost of a new system, that he desired to be absolutely fair and impartial in these investigations, and would be pleased to be met by a similar spirit of fairness on the part of the Water Company, but at the same time did not wish any information to be given him that could not be made public and publicly utilized by him in his report. He was met by a reply that it was not in accordance with the policy of the Company to furnish this Commission with any information that might possibly be used against the interests of the Company, and for that reason said Company would have to decline his request.

Finding it impossible to secure the desired data directly from the Company, we have been obliged to comply with the Charter provision as to the investigation of the value of the old plant through such information as we could secure more indirectly, and in arriving at our conclusions we have utilized the following methods:

1. The appraisement made under the provisions of Ordinance No. 163, Series of 1907.

2. Such inspection as was possible under the limitations imposed upon us.

3. Comparison with the cost of municipal water plants in other cities.

Appraisement Made Under Ordinance 163, Series of 1907.

It is well known that under the Ordinance cited, a report was made by a Board of Appraisers under date of March 20, 1909. This report has been published heretofore, and will not be repeated here.

As this report did not go into details, under date of June 3, 1909, Mr. J. A. Burnett, then President of the Board of Supervisors of this city, wrote to Mr. M. L. Holman, one of the members of the Board of Appraisers asking him certain questions. Under date of June 7, 1909, Mr. Holman replied to this letter of Mr. Burnett, which reply has also been published and is not now repeated.

Being desirous of obtaining further information from members of the Board of Appraisers, under date of July 28th, we addressed letters to Messrs. Hazen, Stearns and Holman, and have received replies from Messrs. Hazen and Holman, in which replies each of these gentlemen practically refuses to give any details by which the fairness of their appraisal may be judged. A reply from the office of Mr. Stearns stated that he was in Europe, and that we could not therefore hear from him.

In studying this appraisal it is well for us to bear in mind the fact that it has no binding force whatsoever, as the question was left entirely to the decision of the people by means of an election, it being specifically stated that the action of the parties in entering into this agreement should not prejudice either, but that their rights, privileges, and franchises should remain the same as if such Ordinance No. 163 had not been passed or its terms agreed upon by the parties.

Note should also be made of the fact that this appraisement was not even made in accordance with the provisions of Section 11 of Ordinance No. 44, Series of 1890, the Ordinance under which the franchise was granted to the Denver Water Company, as Ordinance No. 44 provided, "at the expiration of the period of 20 years from and after the date of the passage and approval of the Ordinance (April 10, 1890), in case the City shall then elect so to do, the said works may be purchased by the said City, and in case the parties cannot agree after such election upon the price to be paid to the Denver Water Company, for the water works of the said Company, its successors or assigns, then their fair cash value shall be determined by arbitration," etc.

Ordinance No. 163, of October, 1907, did not assume to elect to purchase, as the City was not then authorized to do so, nor could the Company then be bound by any such election. It will be seen, therefore, that not only is the appraisal of no legal or binding effect, but also that it was premature, and so being, is without even moral weight.

Referring now more particularly to the findings of the Board of Appraisers, the following comments readily suggest themselves.

The total sum of $14,400,000 is sub-divided only into three general items:

a. The physical plant, etc.	$10,354,075
b. Water rights owned or used by the Denver Union Water Company	2,845,925
c. Business and going concern value	1,200,000
Total	$14,400,00

All of these three items are open to criticism sufficiently serious to warrant their rejection for the following reasons:

a. The physical plant value includes all land and all structures, with allowances for interest during construction, engineering, contingencies, and general expenses, for the entire plat owned or used by the said Company. Amongst these items are a great many that could be of no possible use to the City and County of Denver, and as we are authorized merely "to make a careful investigation of the value of said plant for the uses and purposes of the City and County of Denver and its inhabitants" we are obliged to reject many of the items given in the valuation.

The items for the physical plant are shown somewhat more in detail in Mr. Holman's letter, in the answer to the fourteenth question. Seriatim, they are subject to the following criticisms:

Lake Cheesman, value of structures given at $1,955,000. We are credibly informed that the Cheesman Reservoir did not cost over $1,000,000, and we find by careful study that it would not furnish more than enough water to warrant a purchase at the same amount, i. e., $1,000,000. As the value of any reservoir depends entirely upon the water that it can furnish, we consider this amount a sufficient valuation to place on this item.

Marston Lake, valued at $673,805, we do not consider a suitable source of domestic supply for a city like Denver, where a good water supply is essential. It might perhaps be made to answer for some localities where pure and good water was not to be obtained, but with a source of supply like South Platte River and the upper tributaries of the South Platte, we do not believe Marston Lake adapted to the use of the City, and we cannot therefore include it among the items having value for the uses and purposes of the City and County of Denver, and its inhabitants, unless an independant irrigation system could be constructed, and this we believe unnecessary and therefore not to be considered.

Distribution System: The distribution system is valued at $3,850,165. This amount is considerably in excess of the requirements for an entirely new but similar distribution system but without duplication and, at times, triplication, as demonstrated both by estimates and bids made by competent construction companies, and by the costs of similar distribution systems in other cities. Apparently the estimate does not take into account the fact that, as we are informed by a former chief engineer of the Denver Union Water Company, at least 200 miles out of the total is of less than standard weight, being in fact what is known as gas pipe weight; that about 30 miles of streets are covered by duplicate systems, of which in turn a large portion is again covered by a triplicate system; that the system has been extended from one intended primarily for a small town, to one for a large city, and consequently was never planned originally for the use of a city as large as Denver; that pipes and hydrants were estimated at costs materially higher than those for which purchases in large quantities can be made; that the leakage of the system is stated by competent judges to be large, and that many parts of the system are sufficiently old to demand a considerable charge for depreciation, we believe, after careful study, in view of the facts stated, that $2,000,000 would be a sufficient amount to give for the distribution system.

Main pipe lines of wood, including Cherry Creek and Mississippi Street, are given a total value of $1,602,022. We are of the opinion that both the Cherry Creek and Mississippi Street galleries and pipe lines and also the galleries and pipe line taking water therefrom, just below Platte Canon, should be entirely rejected, as they take water without legal right and the sources of supply moreover are open to suspicion on sanitary grounds. These conduits were built at different times, one of the Platte Canon conduits having been built, as we are informed, in 1889, and being therefore over 20 years old; one being built about 1893, and being therefore about 17 years old; one being built about 10 years ago, or about 1900, while the Cherry Creek and Mississippi Street conduits were rebuilt recently and are therefore nearly new.

In this connection we quote the basis on which the Bureau of the U. S. Census appraises water plants. This basis is said to be as follows:

"The knowledge at the command of the Bureau of the Census leads to the conclusion that this average life is approximately as follows:

For horses, carriages, automobiles and laboratory fixtures and meters, ten years; office furniture and general equipment, fifteen years; boilers, steam pipes and filtration equipment, twenty years, engines, pumping machinery, and wood pipes, twenty-five years; masonry of filtration plant, cribs, iron water pipes, intake pipes, fire hydrants, standpipes, and buildings, fifty years; reservoirs, tunnels and aqueducts, one hundred years; and for the water system as a whole, fifty years."

In view of these facts, and of the estimated cost of new conduits that would furnish a supply of water equal to if not better than the supply now furnished, we are of the opinion that the value of these conduits should not be placed higher than $1,000,000.

The value of reservoirs and stand pipes is given as $374,911. We do not consider that Ashland Reservoirs are of any value whatsoever, excepting as a merely temporary expedient to be utilized until something better can be constructed. The Capitol Hill Reservoirs are in good condition, but are inadequate in size for the requirements of the city. Giving these items their proper depreciation charge, to be deducted from the estimated value of the cost of these reservoirs and standpipes, we consider that $250,000 is enough.

Filters and all other supply works are given a value of $863,136. Not having been furnished the opportunity of examining these filters in detail, and having no definite knowledge as to their capacity, we are not in a position to make a close estimate as to their present value. We know, however, that modern mechanical filters could be constructed for less than $500,000 that would do all of the work required, and taking this fact into consideration, and also the facts that the mechanical filter plants of the Company are not modern and are radically inefficient, we consider this item also as greatly over-estimated, and conclude that $400,000 would be a generous estimate for these features in their present condition.

Pumping stations are estimated at $432,113. In our opinion the Archer Lake pumping station should be done away with altogether, in the future supply for the City of Denver. This pumping station is estimated at $344,750, exclusive of interest. The plant is, however, of some value for temporary needs, but should be discarded as soon as it is practicable to do so. The other pumping stations would not be necessary in a system properly designed to supply the needs of this city, but are also temporarily of some value. Taking these facts into consideration, and also the age and present condition of the pumping plants, and especially the plant at Archer Lake, which has practically reached the age limit, we consider $250,000 a sufficiently high estimate of the present value of these stations.

The personal property is valued at $328,053. As is stated by Mr. Holman, this amount is changing from day to day, and could not be finally adjusted until a transfer of the plant from the Company to the City could be made. We have no knowledge as to whether the personal property now amounts to this sum or not, but for the purpose of arriving at some conclusions, we assume that there is about this much property on hand, or to state it in round numbers we will say $330,000.

Property not used for water works purposes, mostly land, is given a value of $174,870. As it is specifically stated that this property is not used for water works purposes, we do not include it among the items having a value "for the uses and purposes of the City and County of Denver and its inhabitants," but as it would undoubtedly be necessary in acquiring a water plant to acquire also property that could not be used directly for water works purposes, we allow this item to stand at the round estimate of $175,000.

The total given by the Board of Appraisers for the physical plant is $10,354,075. Our estimate as given above is $5,405,000, or only about one-half the amount estimated by the Board of Appraisers. Our reasons for these estimates are somewhat more fully shown in the report made by our Consulting Engineer, Mr. Phillips.

Water Rights Owned or Used by the Denver Union Water Company $2,845,925.

In considering this item the legal aspect of the situation must be kept in mind. It is a well recognized fact that under Colorado laws and Supreme Court decisions, water carried by a corporation belongs not to the corporation itself, but to the consumers who take the water. It is true that the corporation is entitled to a reasonable profit for the carriage of this water, and it undoubtedly follows that in the case of taking over the plant of the corporation, the amount paid for the plant would have to be sufficient to give a reasonable remuneration for such plants, including any cost to which the corporation may have been put in securing its water rights. It is clear, however, that when an appraisal is made of the physical plant of a project, this appraisal, after giving a reasonable remuneration to the Company for such plant, does not and cannot take into consideration any additional value of the water furnished, this belonging to the consumer and not to the corporation.

In this particular case we have the remarkable proposition of a triple value being placed upon some of this water. First the generous estimates as to the value of the physical plant; second, $2,845,925 for the water rights, which should not be included at all, and third, an "irrigated lands value" which is placed upon the lands which furnished the only rights ever purchased and actually belonging to the Denver Union Water Company. Thus an examination of the report on the values of real estate owned by the Denver Union Water Co., outside of the city of Denver, shows that all of the irrigated lands are valued at $140 per acre, the dry lands and other lands without water rights being valued at only $10.00 per acre.

In view of this fact we reject this item altogether and refuse to concede that any value attaches to the water other than the value which is given in the valuation of the physical plant, which depends entirely for such value upon the water supply which it furnishes, which belongs to the people of Denver. For the purpose, however, of showing more clearly the absurdity of the Company's claim attention is called to the following facts.

The highest price known to us as having been paid for water rights of any amount near Denver is approximately $5,000 per cubic foot per second, this price carrying with it the land and improvements thereon. The general price for first class water rights in Colorado generally is about $2,500 per cubic foot per second. As a matter of fact, this Commission has offered to it at the present time decrees of early date aggregating several hundred cubic feet per second, which would be available as an additional supply for the City of Denver in case it needed it, at prices ranging from $1,000 to $2,500 per cubic foot per second. Assuming for the sake of argument that it was necessary for the City to purchase 100 cubic feet per second, which is an ample supply for a city of least 300,000 inhabitants, if properly stored and used, at the maximum price of $5,000 per cubic foot per second, the total cost to the City would be only $500,000. This, when compared with the value placed upon the Water Company's rights, shows the absurdity of its claim. We are of the opinion that 100 cubic feet per second could be purchased for considerably less than half the amount named, but even the highest possible figures shows how ridiculous are the claims of the Company in this matter.

The Denver Union Water Company claims only 76.19 cubic feet per second of water of all kinds, excepting reservoir water, including the amounts "used" by the Company but for which it has no rights whatsoever. Assuming for the sake of argument that the reservoir water would double this amount, which would be more than a generous estimate, the water of the Denver Union Water Co. would have to be valued at over $17,000 per cubic foot per second, to make it amount to the sum fixed by the appraisers, to-wit, $2,845,925.

A study of Mr. Holman's letter shows that he asserts again and again that "the value of each separate water right or equity owned or used by the Denver Union Water Company was not determined. The amount given in the report is the combined value as found by the majority of the Board, also the rights and equities as a source of water for water works purposes." In other words, the Board found that this water, which belongs as a matter of fact to the consumers and not to the Company, and for which no charge whatsoever outside of the valuation of the physical plant should have been made, was worth at least seven times more than it would be necessary to pay by going into the open market and purchasing the water.

Before leaving this phase of the question, it is worth while to call especial attention to the fact that the only water used by the Denver Union Water Company for which it has decrees of any kind or legal title that can be recognized as such, are two-thirds of the second priority of the Platte Cañon Ditch, amounting to 21.25 cubic feet per second; two-thirds of the third priority, Platte Cañon Ditch, amounting to 10.80 cubic feet per second, 1 cubic foot per second carried by the Northern Colorado Irrigation Co. Canal, and 2.50 cubic feet per second, the decree credited to the Archer Plant in 1870, in addition to the Bear Creek decrees which amount to only about 14 cubic feet per second, and which, as handled at the present

time, we consider unsuited to use as a domestic supply for the inhabitants of the City of Denver.

The other claims made by the Denver Union Water Company are not substantiated by any legal titles whatsoever, and could not therefore in any case be considered by us.

Business and Going Concern Value, $1,200,000.

This is the third item going to make up the $14,400,000 appraisal. A portion of this amount is admitted to be the "value of the business during the remainder of the present franchise term." As this franchise term has expired, no credit can be given to this portion of the so-called going concern value, and as this portion is not stated in the report, we have no information as to what proportion was allowed for this item.

In this connection it may not be out of place to call attention to the fact that in making an appraisal of the property owned by the City and County of Denver, but temporarily used by the Denver Union Water Company, no allowance whatsoever was made, so far as we are able to find from the report, for any going concern value, although in this case there was no franchise about to expire, the rights of the City being permanent and perpetual.

It is undoubtedly true that some credit should be given to the business and going concern value, however, as defined in the report "as representing the added value of the plant because of its connections and business, and because the parts are united into one system and are tested and in successful use." Undoubtedly this value will largely depend upon the adequacy and fitness of the plant for the purposes to which it is to be put, and we know that the existing plant is not well adapted to the needs of this City. Assuming, however, that a generous allowance should be made for the business value of the plant, and placing this value at $1,000,000, which in our opinion is at least twice the sum that should be used in making this estimate, we would have as a total $3,405,000 as the entire present value of the plant.

These estimates we believe to be greater than actual conditions justify. It is credibly reported to this Commission, in fact, that the original cost of the present plant was less than $5,000,000, and if that is the case, its present value, owing to depreciation, cannot be more at the present time than $4,000,000, at the very highest.

If in addition to this we add, as is frequently done, ten per cent for the going concern value, we would have as the total present value of the plant $4,400,000.

These estimates are borne out in a general way by the U. S. Census, in its published tables of statistics of cities for 1907. Taking cities of about the size of Denver, we have the following official statistics:

most conservative banking houses of the country, and we are assured also that there would be a ready sale for such bonds in England or France. Even if this were not true, however, we feel sure that the people of this City and County, with probably $100,000,000 of their money held in reserve in savings of different kinds, would, in their patriotism, take the entire issue, if, as suggested, it were issued in small denominations so as to be available for the average wage earner.

The question then is resolved into this: Shall the people own or be owned, and to this question we believe there will be but one answer.

Respectfully submitted,

THE PUBLIC UTILITIES COMMISSION OF THE CITY AND COUNTY OF DENVER,
By ARMOUR C. ANDERSON, *President*,
EDWIN VAN CISE,
A. LINCOLN FELLOWS.

Denver, Colorado, August 20, 1910.

386 Endorsed: In Equity. No. 5572. In U. S. Circuit Court, for the district of Colo. The New York Trust Company, a corporation, complainant, vs. The City and County of Denver, a municipal corporation et al, Defendants. Affidavit of William P. Robinson. Filed Aug. 31, 1910. Charles W. Bishop, Clerk. Gerald Hughes, Dorsey & Hodges, solicitors for The Denver Union Water Company.

In the Circuit Court of the United States for the District of Colorado.

No. 5572. In Equity.

THE NEW YORK TRUST COMPANY, a Corporation, Complainant,
vs.
THE CITY AND COUNTY OF DENVER, a Municipal Corporation; Robert W. Speer, as Mayor of the City and County of Denver; Burt F. Davis, as Clerk of said City and County of Denver; Albion K. Vickery, as Auditor of said City and County of Denver; Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows, as Members of and Constituting the Public Utilities Commission of said City and County of Denver; Ellis Meredith, A. E. Mauff and Harry Petrie, as Members of and Constituting the Election Commission of said City and County of Denver; The Denver Union Water Company, a Corporation, and The South Platte Canal and Reservoir Company, a Corporation, Defendants.

Affidavit of David H. Moffat.

STATE OF COLORADO,
City and County of Denver, ss:

David H. Moffat, being first duly sworn, on his oath deposes and says; that he is the president of The Denver Union Water Company,

defendant and cross-complainant herein; that the first company to be organized for the purpose of supplying the city of Denver and the inhabitants thereof with water was The Denver City Water Company, incorporated under the laws of the state of Colorado on November 30, 1870, that affiant was one of the incorporators thereof, and likewise a member of the board of directors and the treasurer of said corporation, and that he continued to act as a director and treasurer of said company and its successor, The Denver Water Company, until the year 1889; that between December 16, 1870 and May 9, 1874, said The Denver City Water Company had placed its pipes, mains and distributing system in the streets of all that part of the city of Denver which was then settled and required water service, and was maintaining and operating the same therein; that subsequent to 1874, and up to the time in the year 1889,
387 when affiant severed his connection with said company, said The Denver City Water Company and its successors, The Denver Water Company, pursuant to the rights and privileges theretofore granted by the city of Denver, continued to operate and maintain its pipes, mains and distributing system, and from time to time extended the same as the population of Denver increased and the inhabited portion thereof was enlarged; and maintained and operated all of said plant with said extensions in the streets of the city of Denver, supplying through the same water for municipal uses and also for all of the uses of private consumers in said city.

Affiant further says that up to the time when he severed his connection with The Denver Water Company as aforesaid, said company and its predecessor, The Denver City Water Company, had in all things fully and at all times complied with each and every contract between said companies or either of them, and said City of Denver.

Further affiant saith not.

DAVID H. MOFFAT.

Subscribed and sworn to before me this 29 day of August, A. D. 1910.

My commission expires Feb. 19, 1911.

[NOTARIAL SEAL.] HENRY B. TELLER,
Notary Public.

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388 Commission of said City and County of Denver; The Denver Union Water Company, a Corporation, and The South Platte Canal and Reservoir Company, a Corporation, Defendants.

Affidavit of David G. Thomas.

STATE OF COLORADO,
City and County of Denver, ss:

David G. Thomas, being first duly sworn, on his oath deposes and says: That he has resided in Denver since the year 1883, and that he is by profession a civil and hydraulic engineer; that in the year 1887 he became engineer for The Denver Gas Company, and on March 28, 1889, he became superintendent and engineer for The Denver Water Company, and has since acted in the capacity of engineer for said company and its successors, including the present The Denver Union Water Company; that prior to his connection with The Denver Water Company he was, by virtue of his connection with The Denver Gas Company, reasonably familiar with the location and extent of the pipes and distributing system of said The Denver Water Company, and since his connection with said The Denver Water Company as aforesaid he has been and is now entirely familiar with said pipes and distributing system of said The Denver Water Company and of its various successors, including The Denver Union Water Company; that prior to the 10th day of April, 1890, said The Denver Water Company and its predecessors had laid its mains, pipes and other apparatus constituting the distributing system, and said Denver Water Company was then maintaining and operating the same; that said system constituted at that time nearly one hundred miles of mains, and covered all of said city of Denver as it then existed, which was included in what is known as the Congressional Grant, and also all of the streets in those portions of the then City of Denver which were inhabited and required water service; that said inhabited portions included all of North Denver, all of West Denver, and a large area lying easterly of said Congressional Grant, and extending nearly to the present City Park of Denver; that all of said mains, pipes and distributing system had been laid

and was being maintained under said ordinances of 1870 and 1874, attached to the affidavit of William P. Robinson herein, and designated as Exhibits "A" and "B" thereto; that subsequent to said April 10, 1890, said distributing system was from time to time extended as the inhabited portion of said city of Denver was enlarged, and now covers all of the territory formerly embraced within said city of Denver as well as practically all of the territory now
389 included within the limits of the city and county of Denver; that at the present time The Denver Union Water Company owns, maintains and operates a distributing system within the limits of said city and county of Denver, consisting of about four hundred miles of distributing mains, not including service pipes, which are supplied by conduits leading from the storage reservoirs and aggregating over seventy miles in length.

Affiant further says that under the various ordinances of the former municipalities now embraced within the city and county of Denver, referred to in the affidavit of said Robinson herein, the various companies mentioned in said ordinances laid the pipes, mains and conduits in said ordinances and contracts mentioned, and the same have since been maintained and from time to time extended by their successors, including The Denver Union Water Company, and are now being so maintained and operated by The Denver Union Water Company as a part of its water works system or plant for supplying said city and county of Denver and the inhabitants thereof.

Affiant further says that within the territory formerly embraced within the said several outlying municipalities The Denver Union Water Company has, since the expiration of the period of time mentioned in the respective ordinances for the continuance of the contract therein specified, enlarged its distributing system and laid additional mains and pipes in the streets; that said enlargements have been made since the formation of the present city and county of Denver, and with the knowledge of said city and county of Denver and the officers thereof, and without dissent from them, but, on the contrary, under permits issued in the usual manner by the Board of Public Works to make openings in said streets; that since April 10, 1910, said The Denver Union Water Company has extended its pipes and mains, both within the territory formerly constituting the city of Denver, and also within the territory formerly constituting the town of South Denver; that in the town of South Denver it has laid 6694 feet of distributing mains in the streets within said territory at a cost of $14,099.70; and within the limits of what was formerly the city of Denver it has since said date laid 12,922 feet of distributing mains in the streets thereof, at a cost of $36,825.90, and is now engaged in extending said mains for an additional proposed length of 11,600 feet, and at an additional estimated cost of $67,400.00; that all of said enlargements and extensions in said streets since April 10, 1910, have been made with the knowledge of the city and county of Denver and the officers thereof, and without dissent on its or their part, but, on the contrary,
390 permits to open the streets therefor have in the usual manner been issued by the Board of Public Works.

City.	Estimated population.	Length of main pipes in miles.	Per capita per diem.	Net cost of system.
Minneapolis	285,676	348.7	61.6	$6,108,793
Jersey City	243,205	228.6	59.4	8,001,046
Louisville	229,599	305.9	108.9	8,959,763
St. Paul	210,606	298.0	51.2	4,740,295
Providence	207,850	366.2	78.1	7,379,615
Rochester	189,384	333.6	87.7	8,673,208
Kansas City	185,479	371.2	117.8	6,810,171
Toledo	164,673	217.0	71.5	2,179,337
Denver	153,524*	.....	.....	.....
Columbus	148,722	224.8	109.5	4,525,596
Worcester	132,020	202.4	71.5	4,495,333
Memphis	128,799	179.5	119.5	2,988,310
Syracuse	120,631	204.4	99.9	5,500,000
Seattle	.....	.....	.....	4,747,930

*Other statistics not given, not being muncipial plant.

The figures for Los Angeles are omitted, as the conditions there are extraordinary. The estimated cost in 1907 was given as $8,644,350.

Other cities owning municipal plants, having populations ranging from 100,000 to 112,000, have plants costing from about $2,000,000 to $5,500,000.

Water Available for the City.

The question is frequently asked where the Commission proposes to get the water for a new city supply. This question is easily answered. First, it already has existing title to 187.62 cubic feet per second. We believe that if the City's rights to other claims are properly established, as we are satisfied they can be, it will have legal title to at least 76 cubic feet per second in addition to the amount above stated, giving approximately 250 cubic feet per second belonging to the City. We are of the opinion that if these water rights were properly combined and used to the best possible advantage, through storage and properly designed and constructed systems of distribution, that at least 100 cubic feet per second could be utilized by the City in its mains throughout the year. This would be more than an ample supply for the City at the present time, and this we think can be done if the proper steps are taken.

Second, it is a recognized principle of the Colorado law, established both in the constitution and by court decisions, that domestic use is the highest possible use of water, and that water for irrigation purposes may be condemned as sources of domestic supply in case of necessity.

Considering decrees in District No. 8 alone, lying immediately south of Denver, we find that there are decrees for over 100 cubic feet per second prior to 1870, and many hundreds of cubic feet per second

NUMBERED

of later decrees, for water upon which neither the City nor the Denver Union Water Co. has any claim whatsoever. Investigations have shown us that all of this water can be obtained, if necessary, at an average price of not more than $2,000 per cubic foot per second.

In District No. 23, the South Park District, there are decrees for over 200 cubic feet per second, having priorities earlier than 1870, which investigation has shown us can be obtained at a cost of not to exceed $1,500 per cubic foot per second.

In addition to these sources of supply, it is equally possible, under Colorado laws, to purchase old rights lower down on the stream and have these rights transfer-ed to the desired point of intake. This, however, is clearly not necessary, and it is therefore not gone into at this time.

This commission also has been offered a number of reservoir sites capable of storing all of the water needed by the inhabitants of the City and County of Denver, at prices not greater than the estimated value of Cheesman Lake, i. e., $1,000,000. It is not essential or desirable at this time to give the exact locations of such reservoirs, as the owners desire that their names be withheld for the present, but thorough familiarity with the existing conditions has demonstrated to this Commission the entire feasibility of such storage at the cost stated.

In addition to these sources of supply there might be considered, if it were worth while, available supplies from Bear Creek, Clear Creek, Boulder Creek, the branches of Boulder Creek and St. Vrain Creek, and also supplies from the other side of the Continental Divide, all of these supplies to be diverted at high elevation, insuring pure water supply, with storage in granite formations where but little if any contamination would be possible.

In short, a study of existing conditions demonstrates that at least 500 cubic feet per second of early and first class water rights are available to this city as sources of additional water supply in case the necessity arises, and that adequate storage can be supplied at reasonable cost. As to the satisfactory solution of this phase of the problem there can be no doubt whatsoever.

Estimate of Cost of New Water Plant.

This Commission, as heretofore stated, has employed Mr. Hiram Phillips to make an impartial estimate as to the cost of a new system for the City, and we give his conclusion herewith:

Estimate of Cost.

Water rights	$500,000
Storage reservoirs	1,303,750
Conduits from storage reservoirs to distributing reservoirs	1,273,435
Filters, 75,000,000 gal. capacity	400,000
Two distributing reservoirs	440,000
Distributing system	3,402,318
Total	$7,319,503

The above estimate includes engineering and superintendence.

To Recapitulate,

a modern system of water works, with 100,000 acre foot storage reservoir, with duplicate wooden stave supply mains direct from storage reservoirs to duplicate distributing reservoirs of 100,000,000 gallons capacity each, near the city and at such elevations as to obviate the necessity of pumping, and a city distribution system of 333.83 miles of cast iron pipe Class "D" C. F. & I. list, of a minimum size of 6 inches, and 20 miles of wood stave pipe feeder mains, with all necessary hydrants, valves and pavement repairs, can be constructed for the sum of $7,319,503.00.

This amount includes the purchase of necessary water rights, estimated at $500,000.

Your attention is called to the items of wooden stave pipe in the estimate. It is conceded by practically all users of wooden stave pipe that its effective life is from 20 to 30 years. Substituting reinforced concrete construction for wooden staves would increase the cost, but its use would be economy in the end.

And finally as to the worth of the Denver Union Water Co.'s plant to the City of Denver. The matter as it presents itself to me is an impersonal one.

The issue today is to buy or build. With a knowledge of what the water rights will cost, you can safely estimate the cost of a new, modern and adequate system.

Without reference to the purchase price, it is germane to the subject to ask what the City will have if it purchases the Water Co.'s plant?

1st. An aggregation of water rights, which the Board of Appraisers did not agree or state that the Company owned, a number of which, according to some of Denver's best attorneys, are almost valueless.

2nd. A distribution system of many duplicate and triplicate pipes, many inadequate in size and of light weight, and their present physical condition an unknown quantity.

3rd. A wooden stave conduit system, parts of which, according to all the laws of nature, have about lived out their al-otted life. This is confirmed by testimony and actual examinations.

4th. One source of supply, viz. the Mississippi Street Galleries, which is open to grave suspicion of contamination. Those are essentially huge filters that when contaminated can not be cleaned. The locality contiguous is becoming thickly populated, and that section is not famed for its sanitary condition.

5th. Its distributing reservoirs are situated at such low elevations as to require the building of expensive pumping stations, entailing the cost of operating them.

6th. Marston Lake, on account of its location, depth and nature of soil, is not an ideal storage for a domestic supply of water.

7th. The mechanical filters at Marston Lake and Archer Ranch are of such primitive design, and cheap construction, as not to be considered in the design of a modern plant. I am credibly informed that the Marston Lake filters can be, and have been, operated at the

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rate of 18,000,000 gallons in 24 hours. These filters were estimated by the Board of Appraisers at $42,000.00. A 72,000,000 gallon output, at this rate, would cost $168,000.00.

8th. As to the value of the slow sand filters at Platte Cañon, from the standpoint of efficiency, I am unable to express an opinion. I have made no examination of them.

9th. The Cheesman Reservoir is admirably located, and all materials of construction and workmanship are first class. To enable the City to secure all the benefits of a water supply from its storage, a closed conduit should be constructed from the dam to connect with its present conduit system. Settling basins, and possibly filtering plants, would not be necessary.

10th. A positive and indisputable fact as evidenced the present year, is that the plant is inadequate to supply sufficient water under serviceable pressure during dry summer months. Whether this failure is chargeable to the distribution system, pumps, service, mains, capacity of filters or inefficient supervision of operators in charge, has never been confided to the public by the Water Company.

11th. It must also be self evident to any one that the operating expenses must be great, as compared with a gravity plant obtaining its water from one source.

To intelligently consider the worth of the Denver Union Water Co.'s plant, as compared with a new one, its present physical condition, and also a knowledge of the cost of making such renewals, repairs and extensions as will make it a safe and dependable system is absolutely essential; otherwise you are groping in the dark.

With water rights costing not to exceed $500,000, can a serviceable water system, of modern design, of good material and workmanship, adequate for the present and the immediate future, be constructed for $8,000,000?

While the sum of eight million dollars will not construct a plant such as I would like to design, as it renders the use of wooden stave pipe and wooden covered distributing reservoirs unavoidable, it will provide a plant that will furnish a safe storage, reliable carriage and satisfactory distribution of an adequate supply of water for all domestic purposes for Denver.

I realize that it would be to the best interests of both parties to settle their differences amicably. It was with this spirit that I entered upon this work. I recognize that the Company's plant, with all its imperfections, has a positive value beyond its physical worth. It is a "going concern." Its purchase might avoid vexatious delay and costly litigation. But when a corporation has grown so great as to assume that it is more powerful than the great City of Denver, for which it was created, and upon whose bounty it has flourished, and refuses to even confer with her duly elected officials, the self-respect of the municipality demands a loyal support of her executives who are attempting to conserve her rights.

I believe it the duty of the Commission to place before the people the facts as they appear to them in regard to the condition of the water plant and its value to the City, so as to enable them to compare its value with a new plant. If the Water Company is unfairly repre-

PAGES MIS

sented in any way, either as to the condition or present worth of its plant, let it take the people into its confidence as they will be the final judge.

Yours truly,

(Signed) HIRAM PHILLIPS,
Consulting Engineer.

Aug. 19, 1910.

Mr. Phillip's report is, we believe, as complete as it can be made without going to very great expense for detail surveys, and test borings, securing of options, etc. We therefore adopt the conclusions arrived at by Mr. Phillips as our own.

It is undoubtedly true as stated by him that Denver ought to have a better plant than can be constructed for the amount stated. In other words if it were practicable at the present time, we would prefer to construct a plant capable of furnishing a supply for a city of 400,000 inhabitants, this supply to be conducted through reinforced concrete or cast iron pipes, and to be derived only from the highest mountain sources. We believe that it will be the duty of future Public Utilities Commissions to provide such a plant for the City, and in this connection we think that steps should be taken at the earliest possible moment to acquire such supplies of water as can eventually be utilized for such a system.

We desire to call attention to the fact, which we have investigated sufficiently to insure that it is a fact, that this City can be supplied from mountain sources such that the water would be as pure as that furnished to any city in the country. At the same time the freest possible irrigation use of water in the vicinity of Denver would be permitted. In addition thereto electric power can be developed sufficient for the needs of the city.

We are of the opinion, however, in view of the urgency of the present situation, due to the uncertainty as to a supply of water for Denver during the next few years, that the easiest and cheapest course should be pursued at the present time, and we have therefore adopted for the present the plans outlined in Mr. Phillips' report.

Conclusions.

The principal questions before this Commission at the present time, therefore, are these: Was the amount of $7,000,000 in bonds offered to the Water Company sufficient to constitute a fair and reasonable remuneration for its plant, and second, will the bond issue of $8,000,000, if sold or used at par as required by the Charter Amendment, furnish sufficient funds for the construction of a new plant, adequate for the supplying of the needs of this City at the present time?

To both of these questions we give affirmative answers. We believe that the present plant of the Denver Union Water Company is worth less than $7,000,000 as a water supply to the City and County of Denver, and its inhabitants, and we believe further that an adequate system, capable of furnishing a satisfactory supply of water

to the City for the immediate future, can be constructed for $8,000,000.

We believe that, in justice to ourselves, we should call attention to the fact that in the brief time permitted to us, and the entire lack under existing conditions, of any funds for the making of surveys and investigations, excepting such funds as have been advanced by members of the Commission, we have not been able to make such detailed studies as should ordinarily have been made.

Had it not been for the great funds of information voluntarily furnished to this Commission by private interests that have made surveys of both reservoir sites and canal lines throughout the entire region, and the studies with reference to water supply and water plants that have been made by the City in times past, we could not have arrived at even such conclusions as have been outlined herein.

In making these estimates, however, we have, we believe, erred, if at all, on the side of generosity to the Water Company, and we are convinced that the estimates we have made are conservative and safe.

Finally we desire to call attention, as briefly as possible to the serious conditions confronting this City at this time.

It is now depending upon a water supply controlled by a private Company, which is serving only its own selfish interests, as all such companies always do. It is not to be thought for a moment, in fact it is not reasonable to even assume, that such a company will ever look out for the city's interests in the acquisition of such supplies of water as such a city should have for all future time. In fact its own selfish interests would require as they obviously do, that such a company should look out for itself alone, regardless of the City. Interested parties have already given out statements to the effect that the Water Company controls the entire supply of water. This statement, happily, is still far from true, but there can be no question but that the passage of every year increases the difficulty and cost of obtaining new supplies such as we have suggested that the City should have.

Fortunately the city will always have the right of condemnation and even at the worst, it would be far cheaper to condemn the most costly irrigation rights rather than to pay the amount fixed by the Board of Appraisers as the value of the water "owned or used by" the Denver Union Water Company.

We do not believe that any competent authority will say that the present system is adequate for the needs of a city like Denver. It has been pointed out to us by individuals best informed regarding the situation that any summer we may have a far more serious shortage than that which was experienced last June.

In short, the situation is a most serious one. We are confronted by the necessity of immediately constructing a new plant, or permitting the Water Company to go on entrenching itself more strongly, and bringing the people of this City and County into political and financial bondage to a greater and greater extent from day to day and year to year.

But one other question remains, and that is can the bonds be sold at par, and to this question we unhesitatingly reply that they can. We know this by the inquiries and statements made by some of the

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Affiant attaches hereunto a map upon which is shown the boundaries of the city of Denver proper, and also the boundaries of each of the former separate municipal corporations which afterwards became a part of the city of Denver and of the city and county of Denver, either by annexation previous to the adoption of Article XX of the constitution or by consolidation by virtue of said adoption. In respect to each of said separate municipal corporations, including the former city of Denver, is shown the name thereof, the date of the ordinance of the particular municipality granting street rights for water pipes, the name of the company mentioned in said ordinance and the date when said municipality became a part of the city or the city and county of Denver.

Further affiant saith not.

DAVID G. THOMAS.

Subscribed and Sworn to before me this 29th day of August, A. D. 1910. My commission expires February 19, 1911.

[NOTARIAL SEAL.] ALFRED KERNS,
Notary Public.

(Here follows map marked p. 391.)

392 Endorsed: In Equity. No. 5572. In the U. S. Circuit Court, District of Colorado. The New York Trust Company, Complainant, vs. The City and County of Denver et al., Defendants. Affidavit of David G. Thomas. Filed Aug. 31, 1910. Charles W. Bishop, Clerk. Gerald Hughes, Dorsey & Hodges, Solicitors for defendant The Denver Union Water Company.

In the Circuit Court of the United States for the District of Colorado.

No. 5572. In Equity.

THE NEW YORK TRUST COMPANY, a Corporation, Complainant,

vs.

THE CITY AND COUNTY OF DENVER, a Municipal Corporation; Robert W. Speer, as Mayor of the City and County of Denver; Burt F. Davis, as Clerk of said City and County of Denver; Albion K. Vickery, as Auditor of said City and County of Denver; Armour C. Anderson, Edwin Van Cise, and A. Lincoln Fellows, as Members of and Constituting the Public Utilities Commission of said City and County of Denver; Ellis Meredith, A. E. Mauff, and Harry Petrie, as Members of and Constituting the Election Commission of said City and County of Denver; The Denver Union Water Company, a Corporation, and The South Platte Canal and Reservoir Company, a Corporation, Defendants.

Affidavit of Alfred Kerns.

STATE OF COLORADO,
City and County of Denver, ss:

Alfred Kerns, being first duly sworn, on his oath deposes and says: That he is Assistant Secretary of The Denver Union Water Company, defendant and cross-complainant herein; that W. P. Miller is the Secretary of said Company, but that said Secretary is now absent from the city, and in his absence affiant has charge and control of the records of said company; that among the records of said company is a book which purports to be the original record book containing the minutes of meetings of directors and stockholders of The Denver City Water Company; that from said book it appears that the first meeting of the directors of said company was held on December 5, 1870; and it further appears that at said meeting the following resolution was adopted:

Resolved, That the President appointed a committee of four to confer with the Common Council of the city of Denver, and if possible procure from the city of Denver, through its Common
393 Council, with the approval of the Mayor, such grants, rights, privileges and rights of way through the streets of Denver and additions thereto as may in their judgment be most beneficial to the interests of this company.

And at the same meeting it appears that the following resolution was adopted:

Resolved, That the President be and he is hereby authorized and empowered to sign under the corporate seal of this company such contract as he may deem most beneficial to the interest of the company with the city of Denver, for a supply of water, and for the right of way for pipes and other privileges in the streets of said city.

From a record of a meeting of the Board of Directors of said company, held on December 12, 1870, the following appears:

The Secretary read to the Board the following memorandum of a contract and agreements proposed to be entered into by the city of Denver and this company, by its President, for a supply of water, and for the right of way and privilege of laying water pipes in the streets of the said city, viz:

(Here follows *copy* a copy of the contract dated December 16, 1870, which it attached to the affidavit of William P. Robinson herein, as a part of Exhibit A thereto.)

From a record of a meeting of the Board of Directors of said company, held on December 17, 1870, the following appears:

The President stated to the Board that he had entered into and executed a contract with the city of Denver, by its duly authorized officers, for a supply of water, and for the exclusive right of this company to lay pipes for the distribution of water in the streets of Denver and the additions thereto, in strict accordance with the memorandum of agreement as read to this Board at its meeting held on the 12th inst.

Whereupon Daniel Witter offered the following resolution, which was unanimously adopted:

Resolved, That this meeting does hereby ratify and confirm the contract made and executed by the President of this company, for the company, with the city of Denver, for a supply of water and other privileges therein contained.

At a meeting of the Directors held on January 6, 1872, it appears that the following resolution was adopted:

Resolved, That the President appoint a committee of three to confer with a like committee from the council of the city of Denver,
who shall have full power and authority to contract with
394 the city of Denver for a supply of water and fire hydrants
for the extinguishment of fires, and all other purposes, and to contract for supplying the city with suitable hose. The president appointed as such committee Witter, Moffat, Halleck.

In the minutes of the meeting of the directors held on February 2, 1872, the following appears:

The committee appointed to confer with a committee from the council of the city of Denver reported that they had agreed upon the basis of a contract to furnish the city of Denver with water for fire purposes for the term of two years from the date of its acceptance and execution, and that the city council of Denver had appointed a committee, consisting of Aldermen Winne, Crocker and Clifford, to arrange the details of the contract.

On motion of Daniel Witter, the President appointed a committee, consisting of Witter and McCormick, to confer with the committee from the city council and perfect the details of the contract for a supply of water for fire purposes for two years.

In the minutes of a meeting of the directors of said Company, held February 7, 1872, the following appears:

The contract as agreed upon by the committees from the city council and this company, and approved and ratified by the city council of the city of Denver and duly signed by the Mayor of said city, was read by the Secretary, viz:

(Here follows a copy of the contract dated February 6, 1872,

which is attached to the affidavit of William P. Robinson herein, as part of Exhibit B thereto.)

And in said minutes of said meeting it further appeared that the following resolution was adopted:

Resolved, That this Board do hereby ratify and confirm the contract which has just been read with the city of Denver, for a supply of water for fire purposes, for two years from and after date (Feb'y 6/72), and that the President be and he is hereby authorized and directed to sign and execute the same on behalf of this company.

In the minutes of a meeting of the Board of Directors of said company, held on March 2, 1874, the following appears:

The two-year contract with the city of Denver having expired, on motion of D. H. Moffat, Jr., the President appointed a committee of three, consisting of Moffat, Witter and McCormick, to
395 confer with the Mayor and city council of the city of Denver, to enter into a new contract for a supply of water for fire extinguishment and other purposes.

That in the minutes of a meeting of the directors of said company, held May 8, 1874, the following appears:

The committee appointed by the Prest. at the meeting held March A. D. 1874, reported as follows:

To the President and Trustees of The Denver City Water Company.

GENTLEMEN: Under your instructions of March last your committee entered into negotiations with the Mayor and city council for a supply of water for fire purposes, etc., for the city of Denver; but owing to the nearness of the annual municipal election (held in April) they were (unable) to make any contract or agree upon any definite basis of a contract until after the election of a new Mayor and Alderman.

Your committee would further report that after repeated interviews with the Mayor and a committee of aldermen from the city council of the city of Denver agreed upon the basis and details of a contract to be entered in by and between this company and the city of Denver, for a supply of water for the extinguishment of fires and other purposes; said contract to date from May 1/74 and to continue and be for the term of seventeen years from the date thereof.

(The Secretary, by request, read to the Board the memorandum of the contract proposed to be made and entered into with the city.)

Your committee would recommend the approval of and acceptance of the contract as agreed upon.

(Signed) DANIEL WITTE,
D. H. MOFFAT, JR.,
R. R. McCORMICK,
Your Committee.

On motion of F. Z. Salomon, it was resolved that the report of the committee relating to contract with the city be and the same is hereby adopted, and that the President of this company is hereby instructed to enter into a contract with the city of Denver for a supply of water for the term of seventeen years from and after date of May 1st inst.

upon the terms and manner as set forth in the memorandum of contract as reported by your committee.

396 In the minutes of a meeting of the directors of said company held on May 9, 1874, the following appeared:

The President reported to the Board that he had entered into and executed the following contract with the city of Denver, by its Mayor, for a supply of water for fire and other purposes, as directed by resolutions under date of 8th inst., viz:

(Here follows a copy of the agreement dated May 9, 1874, which is attached to the affidavit of William P. Robinson herein, as part of Exhibit B thereto.)

On motion of W. S. Cheesman, it was unanimously resolved that this Board does hereby approve, ratify and confirm the contract made and entered into by the President of this company with the city of Denver, for a supply of water for the term of seventeen years from and after May 1st, 1874.

From the minutes of the annual meeting of the stockholders of said company held on December 5, 1874, the following appears:

The President stated that he had not been able to prepare his annual report owing to his absence from the city, but would state to the stockholders that works were in a highly prosperous condition. Some fourteen miles of pipe have been laid, and there is a constant demand for extensions in all parts of the City, and that the consumption of water had been doubled during the past year, and that owing to the rapidly increasing demand for water, it would, in his judgment, be necessary to enlarge the supply well, as well as increase the pumping capacity of the works.

Further affiant saith not.

ALFRED KERNS.

Subscribed and sworn to before me this 29th day of August, A. D. 1910.

My commission expires Feb. 19th, 1911.

[NOTARIAL SEAL.] HENRY B. TELLER,
Notary Public.

Endorsed: In Equity. No. 5572. In the U. S. Circuit Court, District of Colorado. The New York Trust Company, Complainant, vs. The City and County of Denver, et al., Defendants. Affidavit of Alfred Kerns. Filed Aug. 31, 1910. Charles W. Bishop, Clerk. Gerald Hughes, Dorsey & Hodges, Attorneys for Defendant The Denver Union Water Company.

397 Fifty-seventh Day, May Term.

THURSDAY, *September* 1*st*, *A. D.* 1910.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the third day of May, A. D. 1910.

5572. In Chancery.

THE NEW YORK TRUST COMPANY
vs.
THE CITY AND COUNTY OF DENVER et al.

Bill for Injunction and for Other Relief.

This cause comes on now to be heard on the application of the complainant for an injunction, and upon the application of the respondent The Denver Union Water Company, for an injunction upon the cross-bill herein, Henry McAllister, Junior, Esquire, appearing as solicitor for the complainant, and Gerald Hughes, Esquire, appearing as solicitor for the respondent The Denver Union Water Company, George Q. Richmond, Esquire, appearing as solicitor for the respondent The City and County of Denver and others, and Charles S. Thomas, Esquire, appearing as solicitor for the respondent Armour C. Anderson and others, and is argued by counsel to the hour of adjournment.

Fifty-eighth Day, May Term.

FRIDAY, *September* 2, *A. D.* 1910.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the third day of May, A. D. 1910.

5572. In Chancery.

THE NEW YORK TRUST COMPANY
vs.
THE CITY AND COUNTY OF DENVER et al.

Bill for Injunction and for Other Relief.

This cause comes on now to be heard on the application of the complainant for an injunction and upon the application of the respondent The Denver Union Water Company, for an injunction upon the cross-bill herein, Henry McAllister, Junior, Esquire, appearing as solicitor for the complainant, and Gerald Hughes Esquire, appearing as solicitor for the respondent The Denver Union Water Company, George Q. Richmond, Esquire, appearing as solicitor for the respondent The City and County of Denver, and others, and Charles S. Thomas, Esquire, appearing as solicitor for the respondent Armour C. Anderson and others, and is argued by counsel to the hour of adjournment.

398 Fifty-ninth Day, May Term.

SATURDAY, *September 3rd, A. D.* 1910.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the third day of May, A. D. 1910.

5572. In Chancery.

THE NEW YORK TRUST COMPANY
vs.
THE CITY AND COUNTY OF DENVER et al.

Bill for Injunction and for Other Relief.

This cause comes on now to be heard on the application of the complainant for an injunction and upon the application of the respondent The Denver Union Water Company for an injunction upon the cross-bill herein, Henry McAllister, Junior, Esquire, appearing as solicitor for the complainant, and Gerald Hughes, Esquire, appearing as solicitor for the respondent The Denver Union Water Company, George Q. Richmond, Esquire, appearing as solicitor for the respondent The City and County of Denver and others, and Charles S. Thomas, Esquire, appearing as solicitor for the respondent Armour C. Anderson and others, and is argued by counsel to the hour of adjournment.

Sixtieth Day, May Term.

MONDAY, *September 5th, A. D.* 1910.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the third day of May, A. D. 1910.

5572. In Chancery.

THE NEW YORK TRUST COMPANY,
vs.
THE CITY AND COUNTY OF DENVER et al.

Bill for Injunction and for Other Relief.

This cause comes on now to be heard on the application of the complainant for an injunction and upon the application of the respondent The Denver Union Water Company, for an injunction upon the cross-bill herein, Henry McAllister, Junior, Esquire, appearing as solicitor for the complainant, and Gerald Hughes, Esquire, appearing as solicitor for the respondent The Denver Union Water Company, George Q. Richmond, Esquire, appearing as solicitor for the respondent The City and County of Denver and others, and Charles S. Thomas, Esquire, appearing as solicitor for the re-

spondent Armour C. Anderson and others, and is argued by counsel and by the court taken under advisement.

399 State of Colorado,
Office of the Secretary of State.

Certificate.

UNITED STATES OF AMERICA,
State of Colorado, ss:

I, James B. Pearce, Secretary of State of the State of Colorado, do hereby certify that the annexed is a full, true, and complete transcript of "Shall a New Section be Added to the Charter of the City and County of Denver, To be Known as Section 264-*a*, as follows:" being shown and contained in the Certificate of Amendments adopted to the Charter of the City and County of Denver which was filed in this office the twenty-seventh day of May, A. D. 1910 at 3:55 o'clock P. M., and admitted to record.

In Testimony Whereof I have hereunto set my hand and affixed the Great Seal of the State of Colorado, at the City of Denver, this thirtieth day of August, A. D. 1910.

[Great Seal of the State of Colorado.]

JAMES B. PEARCE,
Secretary of State.
By THOMAS F. DILLON, JR.,
Deputy.

Shall a new section be added to the Charter of the City and County of Denver, to be known as Section 264-*a*, as follows:

SECTION 264-*a*. Nothing in the preceding sections or in this charter, except as herein specifically provided, shall apply to the acquisition or operation of a water works for supplying the City and County of Denver and its inhabitants with water for all uses and purposes, but a public utilities commission is hereby created, to consist of three members, to have complete charge and control thereof, and to have and exercise all the powers given to the board of public works in Chapter IX, as to all public utilities. Except as herein provided, each member of said commission shall be elected for a term of six years and shall serve until his successor is elected and qualifies, and his salary shall be four thousand dollars per annum, payable in equal monthly installments by the treasurer out of the general fund upon the warrant of the commission, and Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows are hereby elected as the first members of said commission to serve, in the order named, from the date of their election to June 1, 1912, June 1, 1914,
and June 1, 1916, respectively, and until their successors are
400 elected and qualify. The names of all candidates hereafter nominated for members of said Commission shall appear on the official ballot without any party designation in connection therewith. Each commissioner shall give bond in the sum of $10,

000 in the manner provided in section 152 of the charter. Said commission shall have power to employ a secretary and such legal and technical help as it may deem necessary, and shall, subject to the civil service provisions of this charter, hire all other employés, and shall fix and pay all salaries and wages and shall fix and collect all rates and charges for any service under its control, which rates and charges shall be made as low as good service will permit. Said commission may adopt reasonable rules and regulations with reference to such service. It shall make an itemized monthly statement of all moneys received and paid out by it, a copy of which it shall file with the city auditor, and shall daily turn over to the city treasurer, as provided in section 260, the money received by it, said money to be paid out by the treasurer only upon the warrant of said commission. Said commission shall have and exercise all the powers of the city and county granted in the constitution or named in the charter in the matter of constructing, purchasing, condemning and purchasing, acquiring, leasing, adding to, maintaining, conducting and operating a water plant or system for all uses and purposes and everything pertaining or deemed necessary or incidental thereto. It shall institute and defend all litigation affecting its duties and powers or in relation to its trusts and all expenses thereof shall be paid by the treasurer out of the general fund upon the warrant of the commission, and it may also call to its assistance the city attorney or any other department of the city government. Except as in this section provided, the city and county shall never purchase or acquire or exercise any option, right, privilege or power of purchasing or acquiring any water plant or system from any person, persons or corporation except upon a vote of the qualified electors first had and obtained authorizing the same, and wherever in any ordinance or contract the former City of Denver was given the right, or the city and county now has the privilege or power to purchase or acquire any water system or plant or to extend any contract with reference thereto, the term "city" used in any such ordinance or contract shall be taken and held to mean the qualified electors of the city and county and not otherwise. No plant owned, acquired or constructed by the city and county and no water rights owned or acquired by the city and county shall ever be sold, leased or otherwise disposed of except upon a vote of the qualified electors first had and obtained, and the same shall be under the sole control and management of said commission. Any member of said
401 commission may be recalled and his successor named at any time in the manner provided by the recall section of this charter. Any vacancy shall be filled by the remaining members of the commission and such appointee shall serve until the next municipal election and until his successor is elected and qualifies. Upon a vote of the taxpaying electors authorizing the same, as hereinafter provided, the City and County of Denver shall and it does hereby authorize the creation of an indebtedness in the sum of eight million dollars to provide a municipal water plant or system and everything incidental or necessary thereto for supplying the city and county and its inhabitants with water for all uses and purposes,

said indebtedness to be evidenced by its bonds of the par value of eight million dollars, in convenient denominations of not more than one thousand dollars each and bearing four and one-half per centum interest per annum, of such date and in such form and maturing at such times as may be prescribed by said commission. The council shall pass such ordinances as said commission may deem necessary respecting the issuance of said bonds or to the full exercise of all the powers given it, in the form recommended by the commission, and without amendment, and the mayor shall sign the same. Said commission shall issue said bonds only from time to time as they are required for actual use or sale, and the mayor shall sign them and the clerk shall sign and attest them under the seal of the city and the auditor shall register them, with the approval of the president of said commission endorsed thereon. No such bonds shall be used or sold at less than par, nor sold except after advertisement as in this charter provided for the sale of public improvement bonds, and they may be called for redemption and redeemed by the commission in like manner as provided in section 314. If the Denver Union Water Company shall place in escrow with the Continental Trust Company of Denver, on or before July 1, 1910, a good and sufficient deed of conveyance from said water company, to the City and County of Denver for all the property of every description included and embraced in the appraisement under Ordinance 163, series of 1907, free and clear of all liens, encumbrances, claims and demands of every kind and character, accompanied by a valid surrender and release of any and all rights, claims and demands said company or any of its subsidiary, associated or affiliated companies may have against the city and county or against any of said property, with direction in writing to deliver the same to said commission in exchange for seven million dollars of said bonds at par, then the commission shall file its acceptance with said trust company and the same shall constitute a binding contract of purchase. In that event then at a special election
402 which the council shall call within sixty days after the adoption of this amendment, to be held on the first Tuesday in September, 1910, there shall be submitted to the qualified taxpaying electors the question of issuing the said eight million dollars in bonds, of which seven million dollars at par shall be delivered to said trust company as aforesaid and the other one million dollars of bonds, or so much thereof as may be deemed necessary, shall be sold or used by the commission to improve, repair and add to the water plant so purchased. The ballot shall have printed on it the words "For the issuance of Eight Million Dollars in bonds for the Purchase and Repair of the existing Water Plant under the provisions of section 264-*a* of the Charter," and on a separate line the words, "Against the issuance of Eight Million Dollars in bonds for the Purchase and Repair of the existing Water Plant under the provisions of section 264-*a* of the Charter," with a space opposite each such line in which the voter may make his mark indicating his vote. In case the Denver Union Water Company shall fail or refuse to fully comply with all the foregoing provisions as to the

things to be done and performed by it, then at the special election aforesaid in lieu of the foregoing question, there shall be submitted to the qualified taxpaying electors on the ballot the question of issuing eight million dollars in bonds to be sold or used to construct and put into operation a complete system of water works for supplying said city and county and the inhabitants thereof with water for all uses and purposes. Said ballot shall have printed on it the words, "For the issuance of Eight Million Dollars in bonds for the Construction of a new Municipal Water Plant," and on a separate line the words, "Against the Issuance of Eight Million Dollars in bonds for the Construction of a new Municipal Water Plant," with a space opposite each such line in which the voter may make his mark indicating his vote. Such bonds, or so much thereof as the commission may deem necessary, shall be sold or used, by it to construct and put into operation a complete system of water works for supplying said city and county and its inhabitants with water for all uses and purposes, and said commission shall forthwith proceed to construct the same. The said commission shall, immediately upon its election, in case the Denver Union Water Company has not accepted the seven million dollars in bonds for its plant as aforesaid, proceed to make a careful investigation of the value of said plant for the uses and purposes of the City and County of Denver and its inhabitants, and also proceed to make a careful estimate of the cost of constructing a complete new water system for the City and County of Denver and the inhabitants thereof and may submit an alternative bond proposition at said special election for the issuance of bonds
403 in such sum as it may deem advisable for the acquisition or construction of a water plant or any part thereof by any of the ways within its powers herein mentioned, and the same shall be placed on said ballot in such form as said commission may determine, and it may also submit any proposition concerning its powers or trust at any municipal election in like manner. If a majority of the votes cast thereon shall be in favor of any proposition submitted it shall thereby be adopted, and in case alternative propositions are submitted, and each receive a majority, then the one receiving the greater affirmative vote shall be the one adopted. Such adoption shall be a sufficient authorization for the issuance of the bonds thereby provided for and the same, when issued, shall be and constitute an indebtedness of the City and County of Denver for the purposes aforesaid, and the provisions in this section relative to the issue, sale and redemption of bonds shall apply thereto. Any provisions of the charter in conflict herewith is hereby repealed.

The above proposed amendment to the Charter was voted on by answers to the following questions:

For Citizens' Section 264-*a* of the Charter concerning a water plant ( )

Against Citizens' Section 264-*a* of the Charter concerning a water plant ( )

Total number of votes cast for the above proposed amendment to the Charter of the City and County of Denver, was 12342.

Total number of votes cast against the above proposed amendment to the Charter of the City and County of Denver, was 10399.

Majority for the above proposed amendment to the Charter of the City and County of Denver, was 1943.

Stamped: This document was written by Doris Moore, Stenographer, Date August 30" 1910. Compared by Kelly & Fowler.

Endorsed: 5572. U. S. Circuit Court, District of Colorado. The New York Trust Company vs. The City and County of Denver, et al. Transcript of Proposed Section 264-*a* of the Charter of the City and County of Denver. Filed Sep. 5, 1910. Charles W. Bishop, Clerk.

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the Circuit Court of the United States in and for said District.

404 THE NEW YORK TRUST COMPANY, Complainant,
vs.
THE CITY AND COUNTY OF DENVER et al., Defendants.

Affidavit.

STATE OF COLORADO,
City and County of Denver, ss:

Edwin Van Cise, of lawful age, being first duly sworn according to law, deposes and says:

That he is a citizen and resident of the city and county aforesaid, and was such on and before the 17th day of May, 1910, and is one of the defendants in said cause and a member of the Public Utilities Commission of the city and county of Denver; that he personally knows that with Section 264-*a*, known as the Citizens' Section of the Charter concerning the water plant, which was adopted at said election, there were submitted two alternative propositions, or amendments, upon the same subject, to-wit: One entitled, "For Section 264½ concerning a Public Utility Board and Water Plant," and one entitled, "For a Business Settlement of the Water Question, removing it from politics, compelling all taxable property, including corporation and vacant property, to pay its proportionate share for water plant, by creating a non-partisan commission of five, and for adopting Section 264½ of the Charter." That the first of the said alternative propositions above mentioned was divided into seven separate paragraphs, which were numbered from one to seven, successively, as they appeared on the final ballot. That the last of said alternative propositions was divided into eight spaces or paragraphs, which were not numbered or otherwise distinguished. That copies of said alternative propositions are here inserted in this affidavit:

SECTION 264½. (Paragraph 1.) Nothing in the preceding sec-

tions or in this Charter, except as herein specifically provided for, shall apply to the acquisition, control, or operation of a water works, and the supplying of the city and county of Denver and its inhabitants with water for all uses and purposes; neither shall it apply to the acquisition or control of any gas, electric light, telephone, or street car system or plant, but a Public Utility Board is hereby created, to consist of three members (all of whom shall be legal voters of the city and county of Denver), to have complete charge and control of all of said matters. Except as herein provided, each member of said Board shall be elected for a term of six years, and shall serve until his successor is elected and qualified, and his salary shall be four thousand dollars ($4,000) per annum, payable in equal monthly installments out of the General
405 Fund, and Daniel Vandermeulen, John C. Barrett and William A. Alger are hereby elected as the first members of said Board, to serve in the order named, from the date of their election to June 1st, 1912, June 1st, 1914, and June 1st, 1916, respectively, and until their successors are elected and qualify. The member holding the shortest term shall be chairman, and each member shall give bond in the sum of ten thousand dollars in the manner provided in Section 152 of this Charter. A majority of the Board can transact all business, and may fill all vacancies for an unexpired term that may occur therein by death or resignation.

(Paragraph 2.) Said Board shall have power to initiate ordinances to be voted upon at any election upon the signatures of its members without any petition being signed therefor; to adopt reasonable rules; to employ a secretary and such professional and technical help as it may deem necessary; and shall, subject to the civil service provisions of the Charter, hire and discharge all its employees, and shall fix and pay their salaries and wages. It shall also fix and collect rates and charges for any service herein named that is owned by the city, but on plants not owned by the city it can only fix rates and charges by and through initiatory ordinances, as provided in Section 268 of this Charter. Provided, however, that the rates demanded or charged by The Denver Union Water Company from and after the passage hereof, and until it shall be changed by an initiatory ordinance, shall in no case exceed, for substantially the same service, the amount of 75% of the rate fixed by the so-called leaflet heretofore promulgated by said company. A greater rate than that herein provided for is hereby declared to be unreasonable and unjust. For each violation of this provision, the officers and directors of said company shall be personally and separately liable to a fine of from one dollar to one hundred dollars (and costs), to be collected by the usual process, the one-half of which shall go to the informant, and the other half to the school fund of the city and county of Denver. This provision shall be held self-executing, without the aid of an ordinance, or further legislation. Said Board shall make an itemized monthly statement of all money received and paid out by it, a copy of which it shall file with the City Auditor, and shall promptly turn over to the City Treasurer, as provided in Section 260 hereof, all money received by it, said money

to be paid out by the Treasurer only on the warrant of said Board. All expenses incurred by said Board shall be paid out of the general fund.

(Paragraph 3.) Said Board shall have and exercise all the
406 powers of the city and county of Denver, granted in the Constitution or named in the Charter, in the matter of constructing, purchasing, condemning and purchasing, acquiring, leasing, adding to, maintaining, conducting and operating a water plant or system for and on behalf of the city and county for all purposes, and everything pertaining or deemed incidental thereto. It shall institute, defend, and control all litigation in relation to its trust, and may call to its aid the City Attorney, or any other department of the city government. Except as in this section provided, the city and county shall never purchase or acquire any option, right, privilege, or power of purchasing or acquiring any water plant or system or any public utility, except upon a vote of the qualified electors first had and obtained authorizing the same and wherever in any ordinance or contract the former city of Denver was given the right, or the city and county now has the privilege or power to purchase or acquire any water system or plant, or to extend any contract with reference thereto, the term "city" used in any such ordinance or contract shall be taken and held to mean the qualified electors of the city and county, and not otherwise. No public utility plant owned, acquired, or constructed by the city and county, and no water or water rights owned or acquired by the city and county, shall ever be disposed of in any manner except upon a vote of the qualified electors first had and obtained. Any member of said Board may be recalled and his successor named at any time, in the manner provided by the recall section of this Charter.

(Paragraph 4.) Upon a vote of the tax-paying electors authorizing the same, as hereinafter provided for, the city and county of Denver shall, and it does hereby authorize the creation of an indebtedness in the sum of ten million dollars ($10,000,00-) to provide money for the purchase, improvement and repair or the construction, or acquisition of a water works and everything incidental or necessary thereto, and the supplying the city and county and its inhabitants with water for all purposes; said indebtedness to be evidenced by its bonds (bearing 4% interest per annum), to mature in ten equal five-yearly installments, the first installment to mature in five years, and the last installment in fifty years from the date of the original issue, in manner and form as provided by Sections 258 and 259 of this Charter; and the city council, within thirty days after a vote of the tax-paying electors authorizing said bonded indebtedness, shall pass an ordinance authorizing such bond issue in conformity with the provisions of said Sections 258 and 259, and the Mayor shall forwith sign the same. The clerk shall thereupon forthwith cause to be prepared the said bonds, and the Mayor
407 shall forthwith countersign them. The full issue of said bonds shall thereupon forthwith be turned over to the Public Utility Board, and it shall forthwith tender to The Denver Union

Water Company nine million dollars ($9,000,000.00) par value of said bonds in exchange for good and sufficient deed of conveyance from said company to the city and county of that certain property more particularly described in the appraisements made under Ordinance No. 163, Series of 1907, and embracing: Lake Cheesman, the intake and filtration system complete at Platte Canon, all conduits from Platte Canon to the distributing system in Denver, the complete distributing system in the city and county of Denver, including all reservoirs, stand pipes, and pumping plants within said city and county, and all rights of way, or any interest therein, necessary to the full use and enjoyment of said property, or any part thereof, and including all water and water rights claimed by said company, as described in Ordinance 163 aforesaid, free and clear of all liens, encumbrances, claims and demands of any kind and character. Said conveyance shall be accompanied by a valid surrender and release of any and all rights, claims and demands said company, or any of its subsidiary, associated or affiliated companies may have against the city and county, or against any of said property, and upon receipt of such deed or deeds of conveyance and release, the Public Utility Board shall cause to be delivered to said company the said nine million dollars ($9,000,000.00) in bonds. In the event of such purchase, the balance of said issue of bonds, or so much thereof as the board may deem necessary, shall be sold by it to provide money with which to improve, repair, or add to the water works so purchased. (Nothing herein shall be taken as concession that the actual cash value of the property above described exceeds five million dollars ($5,000,000.00), but the sum of nine million dollars ($9,000,000.00) is authorized to be offered for it by said Board as a compromise. Neither shall it be taken as an admission, in any litigation that may follow, of the legal organization of any Water Company, or its legal right to hold property, but all such questions are hereby reserved to the said city and county, and may be raised by it at any time hereafter.)

(Paragraph 5.) In the event The Denver Union Water Company shall refuse or fail to accept said tender, and make said conveyance, and furnish said release, within thirty days after said tender is made by said board, then the whole of said bonds, or so much thereof as may be necessary, shall be sold by said board to provide money with which to acquire, construct, and put into operation a system of water works for supplying said city and county of Denver
408 and the inhabitants thereof with water for all uses and purposes, and said board shall, after the expiration of the franchise to The Denver Union Water Company, to-wit, April 10th, 1910, proceed to construct and acquire a complete water system for said city and county, The right and the title to the water used and being used by The Denver Union Water Company to supply the people of the city and county of Denver is hereby declared to be in the people of the city and county of Denver, and the Public Utility Board shall take such steps as may be necessary to establish such right, and prevent The Denver Union Water Company, or its assigns, from using such water for any other purpose whatsoever.

Said board may also in its discretion proceed under the laws of Colorado to acquire by condemnation proceedings and take over to said city and county of Denver any reservoir or reservoirs of any person, persons, or company, or any or all of the property of The Denver Union Water Company which property pertains to a water system for the city and county of Denver. And said board may apply such portion of said bonds, or the money derived therefrom, as may be necessary in payment for property of properties acquired by such condemnation suit or suits.

(Paragraph 6.) Within ninety (90) days after the general municipal election to be held on the third Tuesday in May, 1910, there shall be submitted to the qualified tax-paying electors, on a separate ballot, the question of issuing the said ten million dollars ($10,000,000.00) in bonds for the purpose aforesaid. The ballot therefor shall have printed upon it the words, "For the issuance of ten million dollars ($10,000,000.00) in bonds for a municipal water plant," and on a separate line the words, "Against the issue of ten million dollars ($10,000,000.00) in bonds for a municipal water plant," with a space opposite each such line in which the voter may make his mark indicating his vote. If a majority of the tax-paying electors voting thereon shall vote in favor thereof, the said bond issue shall thereby be authorized as an indebtedness of the city and county of Denver for the purpose aforesaid. The said bond election shall be held by the election officials of the general municipal election held on said date, but in each election precinct a separate ballot-box shall be provided, in which the ballots shall be deposited by the tax-paying electors, and such ballots shall be separately counted and returned, and a separate record kept of those voting thereon.

(Paragraph 7.) This section shall receive a liberal construction, and any and all parts of the city Charter, or any ordinance that conflicts with anything herein contained, is hereby repealed.

409 SECTION 264½. A Water Commission is hereby created and established, to consist of five members, which shall have, possess and exercise in the name of the city and county of Denver all the powers of the city and county of Denver granted in the constitution or in the Charter in the matter of acquiring, owning, condemning and purchasing, constructing, leasing, adding to, maintaining conducting, and operating water works, a water plant and system, and obtaining water service for all purposes and everything pertaining or incidental thereto, and shall have, possess and exercise such other powers and duties as are herein set forth.

The first members of said commission shall be appointed by the Mayor, one member to serve for two years, one member for four years, one member for six years, one member for eight years, and one member for ten years, provided that The Denver Chamber of Commerce, The Denver Real Estate Exchange, The Colorado Manufacturers' Association, and The Colorado Traffic Club, by their respective boards of directors, shall each have the right to present to the Mayor within thirty days after the adoption of this amendment the names of two persons willing to serve, and he shall appoint as a

member of the Commission one of the two persons so recommended and presented by each organization. Thereafter, their successors shall be appointed by the Mayor, and shall serve the full term of ten years, except when appointed to fill an unexpired term, and in all cases shall serve until their successors are appointed and qualified, and the member of said Commission whose term first expires shall be the President thereof. Said Commissioners shall serve without pay, and must be and have been duly qualified tax-paying electors, as well as citizens and residents, of the city and county of Denver for at least five years prior to the date of their appointment. The management and administration of said Commission shall be entirely non-political, and no more than three of the members of said Commission shall be of the same political party. Each Commissioner shall take the oath of office and give bond in the sum of ten thousand dollars in the manner provided in sections 151 and 152 of the Charter. Said Commission shall have power and authority to employ a secretary and fix his compensation, and to call upon any of the departments of the city government for information and assistance in their preliminary work, and prior to a settlement of the water question by a vote of the tax-paying electors. Should general bonds be voted as hereinafter provided for acquiring, purchasing, owning, or constructing a water plant, then said Commission shall have power and authority to employ a manager and to engage and have such employés as it may deem necessary, and all employés except the manager shall be subject to the civil service provisions of this Charter, and said Commission shall hire and discharge all of its employés and fix and pay all salaries and wages. A monthly statement, in writing, of money received and paid out by it shall be made, a copy of which shall be filed with the Auditor, who shall audit its accounts, and it shall each year publish a full annual statement and report of its proceedings and acts, and also of its receipts and disbursements in detail, and it shall daily turn over to the city Treasurer of the city and county of Denver, as provided in sections 221, 222 and 223 of the Charter, the money received by it, and said Treasurer shall open a separate account with said Commission relating to all of said money and all receipts and all disbursements on account thereof, and said money shall be paid out by the Treasurer only upon the requisition of said Commission and upon a warrant drawn by the Auditor and countersigned by the President of said Commission. The Attorney, the Auditor, and the city Treasurer for the city and county of Denver shall be respectively the attorney, the auditor, and the treasurer of the said Commission.

Immediately upon the election and qualification of said Commissioners, the said Commission shall proceed to investigate the question of acquiring or constructing a water plant or of obtaining service for supplying the city and county of Denver and the inhabitants thereof with water, and for that purpose shall negotiate with the Denver Union Water Company and ascertain for what amount its system can be purchased or acquired, and also shall in-

vestigate to ascertain what would be the cost of a new, adequate, up-to-date water works, water plant and system for the city and county of Denver, and also upon what terms a franchise from said company for supplying the inhabitants of said city and county with water can be obtained; and after fully investigating said questions and any and all other matters and things it may deem necessary and proper, to consider and determine the best solution for supplying the inhabitants of the city and county of Denver with an adequate water supply and service at a minimum cost. Upon reaching such a decision and transmitting the same to the council of the city and county, said council shall call a special election, to be held at such time as shall be fixed by said Commission and at said election there shall be submitted to the qualified tax-paying electors for their approval the question of adopting the determination reached and recommended by said Commission, and said Commission may submit in like manner any other proposition for settling and adjusting the question of water supply and service for the city and county of Denver and the inhabitants thereof, whether the same may
411 involve the issuance of bonds or not. And at said election, to be called and held as aforesaid, the ballot shall have printed on it the appropriate words, as determined by said Commission, for and against the question submitted, with a space opposite each question where the voter may make his mark indicating his vote. If a majority of the votes cast thereon shall be in favor of any proposition submitted it shall thereby be adopted, and where two or more propositions or an alternative proposition is submitted, the one receiving the greater affirmative vote shall be the one adopted. In case none of the propositions submitted at such election are adopted, then in that case, the said Commission shall proceed to formulate other and different propositions than those submitted at said election as it may deem best for providing a water supply and service for said city and county and its inhabitants, and thereafter and whenever said Commission shall file a request therefor with the council of said city and county, said council shall call a special election to submit any and all questions or propositions desired by said Commission, in the manner and form as provided for at the special election aforesaid, or said Commission may submit any such proposition at any general election of the city and county, provided that not more than one special election shall be held in any one calendar year for the purposes set forth herein.

In case that at any such election there is authorized by a majority of the qualified tax-paying electors voting thereat an issuance of general bonds, the city and county of Denver shall, and it does hereby authorize the creation of an indebtedness in the amount of the general bonds so authorized to be issued for the purposes named herein, and the said bonds, when issued, shall be and constitute a general indebtedness upon the entire city and county of Denver for the purposes aforesaid. Said bonds shall be issued in convenient denominations of not more than one thousand dollars each, bearing such rate of interest per annum, of such date and in such form and maturing at such times as may be prescribed by said Commission,

provided that said bonds shall mature in equal five-yearly installments, the first installment to mature not earlier than five years, and the last installment not later than fifty years from the date of original issue, and the principal and interest may be made payable in the city and county of Denver or elsewhere as may be determined by said Commission. Said bonds, or so much thereof as the said Commission may from time to time deem necessary, shall be issued and used by it, or issued and sold by it and the proceeds thereof used, to acquire, improve, purchase, condemn, or construct and put into operation a complete system of water works and
412 water plant for supplying said city and county and its inhabitants with water for all uses and purposes. None of said bonds shall be used or sold at less than par, nor sold except after advertisement as in this Charter provided for the sale of public improvement bonds. The council shall pass such ordinances as said Commission may deem necessary respecting the issuance of said bonds and for the full exercise of all the power given said Commission, in the form recommended by the Commission and without amendment, and the Mayor shall sign said bonds and the clerk shall sign and attest them under the seal of the city and county, and the Auditor shall register them, with the approval of the President of said Commission endorsed thereon. Upon the issuance of said bonds or any part thereof, the said Commission shall forthwith proceed to acquire, purchase, condemn, construct and put into operation a complete system of water works and water plant for supplying said city and county and its inhabitants with water for all uses and purposes.

The principal of said bonds shall be paid by a general levy on all the taxable property of the city and county as herein provided, and for that purpose a sinking fund shall be established, to be kept by the Treasurer, and the city and county shall annually, by its proper authorities, levy a sufficient tax for the raising of, and appropriate and pay into said sinking fund an amount equal to one-fiftieth part of the principal of said bonded indebtedness, to be paid by the said Treasurer in payment of said bonds as they mature. The interest on said bonded indebtedness shall be paid from the earnings of said water works and plant, but the city and county shall primarily be liable to pay such interest, and the Treasurer shall pay said bonds and interest without any warrant from the Auditor of said Commission. When there shall be to the credit of said sinking fund a sum not less than twenty thousand dollars which may be applied to the redemption of any outstanding bonds to which said fund is applicable and which are not redeemable before their maturity, then such money may be invested by the Treasurer in general, special or public improvement bonds of the city and county of Denver, maturing at a date prior to those to be redeemed by such sinking fund; provided, he shall not pay for such bonds a sum greater than the amount of the principal and accrued interest.

The said Commission shall have power to, and shall regulate, fix, charge, and collect all rents and charges for any service under its control, and may prescribe reasonable rules and regulations with

reference to such service, and said Commission may provide for and enforce a flat charge of not less than two dollars per year for
413 readiness to serve, against any and all vacant and unoccupied lots abutting upon any highway along which a main is laid, and such charge and interest thereon at the rate of eight per cent. per annum from date of making such charge shall be a lien upon any and all such lots and may be collected by said Commission from the owners of such lots in any court of competent jurisdiction, and no connection shall be made with any of such lots for water service until all such charges against such lot, and interest thereon, shall have been fully paid; provided, that the city and county for its municipal purposes shall not pay a rate to exceed one hundred thousand dollars per annum, and that all sums paid by the city and county for water service for municipal purposes shall be applied and used by said Commission in payment of extensions and betterments of said water plant and system, and provided further, that all rents and charges for water service shall be fixed by said Commission in an amount sufficient to pay annually all cost of maintenance and operation and necessary extensions and betterments except as herein provided, plus accruing interest on all outstanding bonds, and if during any one year the rates fixed and charged shall prove insufficient for such purpose, they shall be increased for the next year sufficiently to pay the deficiency.

All rights of way and easements which it shall be necessary to acquire in or about the premises shall be acquired in the manner provided for the acquisition of such rights of way and easements in the case of public improvements and all condemnation proceedings necessary in or about the premises and to carry out the purposes of this section shall be as provided by law. In exercising its powers and duties, the said Commission in its use and occupation of the streets and highways of the city and county of Denver, shall be subject at all times to the rules and regulations of the Board of Public Works and to the ordinances of the city and county of Denver.

This section 264½ is in lieu of any and all provisions of article IX of the Charter in so far as the same relates to the acquisition, ownership, and operation of water works, water plant or system, or water service, or relates to the matters and things herein provided for.

If the city and county of Denver shall at the same election at which this amendment is submitted to the duly qualified electors, or at any election held under the direction of said Water Commission, elect by a majority vote of its qualified tax-paying electors to grant to The Denver Union Water Company, its successors and assigns, a new franchise and contract for supplying the city and county of Denver and the inhabitants thereof with water,
414 then this amendment, as well as any other amendment creating a Water Commission adopted at said election of May 17, 1910, shall be inoperative and of no effect.

Affiant avers that the said two alternative propositions hereinabove set forth in full were defeated at said election, and that the

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id so-called Business Settlement of the Water Question, as this iant was informed and believes, was prepared at the instance of e Honorable Robert W. Speer, the Mayor of said city and county, the attorney of and for said city and county, and was actively pported by and understood to be the Mayor's proposition or plan r disposing of and adjusting the so- called water question. That, affiant is informed and believes, his Honor, the Mayor, advocated e said proposition both officially and as a citizen and tax-payer the city and county of Denver.

That, as affiant is further informed and believes, the said so-called siness proposition or plan was explained and advocated as au-orizing, in the event of its adoption, the issuance of bonds in the m of fourteen million four hundred thousand dollars ($14,400,-00.00) for the purchase of the property of the Denver Union Water mpany and its subsidiary corporations, and of the additional sum three million one hundred thousand dollars ($3,100,000.00) for tensions and improvements needed to make the said system an fficient and perfected one.

That both of said alternative propositions were placed upon the allot for said election of May 17th, 1910, as affiant is informed and elieves, by petitions duly circulated and signed under the provisions f Article XX of the constitution concerning and authorizing pro-osed measures and Charter amendments. And further affiant saith ot.

EDWIN VAN CISE.

Subscribed and sworn to before me this 5th day of September, . D. 1910. My commission expires January 31st, 1910.

[NOTARIAL SEAL.] ANDREW T. MONSON,
Notary Public.

Endorsed: No. 5572. In the United States Circuit Court of the District of Colorado. The New York Trust Company, Complainant, versus The City and County of Denver, et al., Defendants. Affidavit of Edwin Van Cise. Filed Sep. 5, 1910. Charles W. Bishop, Clerk. Thomas, Bryant & Malburn, Attorneys for ——, 621-627 Ernest and Cranmer Bldg., Denver, Colo.

15 UNITED STATES OF AMERICA,
District of Colorado, ss:

n the Circuit Court of the United States in and for said District.

No. 5572. In Chancery.

THE NEW YORK TRUST COMPANY, Complainant,
vs.
THE CITY AND COUNTY OF DENVER et al., Defendants.

TATE OF COLORADO,
City and County of Denver, ss:

Charles S. Thomas being first duly sworn according to law, de-oses and says: That on or about the 18th day of June, 1909, he

was directed by Mr. J. A. Burnett, then president of the Board of Supervisors of the city and county of Denver, to address a letter to Mr. M. L. Holman, one of the Board of Appraisers selected by the City and County of Denver to appraise the property of the Denver Union Water Company, under Ordinance No. 163 of the series of 1907, affiant having theretofore been employed by said city and county as one its counsel before said Board; that affiant's instructions, among other things were to ascertain from Mr. Holman the reasons why the said board of appraisers did not in their appraisement of March 20th, 1909, and as a part of its duties, agree upon and recommend to the said Denver Union Water Company rates to be submitted by it for a franchise for twenty years based thereon, as required by said ordinance No. 163.

Thereupon, and on, to-wit, the 18th day of June, A. D. 1909, affiant wrote to the said Holman at St. Louis, Missouri, from which the following is quoted:

I have been requested by Mr. Burnett, representing the Finance Committee, to further trespass upon your patience by asking about some matters which its members think they should be informed of if they should be catechised either by the committee or by others representing the body of the community, and, first, as to the schedule of rates about which the board was unable to agree and upon which no report was therefore made. We would like a short account of the nature of your deliberations over this matter, the reasons for your disagreement, whether you were able to agree upon any of the schedules, the basis of valuation used for proposed rates by the board, or any of them, the differences between the company and the city appraisers" etc.

416 Thereafter a letter was received from Mr. Holman, of date the 28th day of June, A. D. 1909, of which the following is a true copy:

Holman & Laird, Consulting Engineers, Chemical Bldg.

ST. LOUIS, *June* 28, 1909.

Report to the Finance Committees of the Board of Aldermen and the Board of Supervisors of the City and County of Denver, Colo.

GENTLEMEN: The following personal report is submitted at the request of Governor C. S. Thomas, special counsel for the City and County of Denver, viz:

Water Rates.—20-Year Schedule.

1st. The terms of Ordinance 163, series of 1907 relating to a new schedule of water rates are as follows:

SEC. 5. * * * 'and also at the same time, to the electors qualified to vote thereon, the question as to whether a contract or franchise shall be granted to The Denver Union Water Company, party of

the second part, its successors or assigns to supply water to the city and county of Denver and its inhabitants upon the schedule, terms and conditions and for the rates set forth in a proposition to be made by the said The Denver Union Water Company, party of the second part, as provided herein, with rates in said contract to be definitely fixed and easily and plainly understood, and to be ascertained and fixed by said arbitrators herein provided for, which shall be fair, just and reasonable rates for the water supplied and services performed and give to said company, fair, just, and reasonable returns upon a fair and reasonable valuation of its property, and to cover a period of twenty (20) years from and after the date of said election.' * * *

2nd. It will be noted that the rates, only, were to be determined by the Board of Appraisers. These rates, when fixed, were to be included in a schedule to be submitted by the company to the electors. In order to estimate, with any reasonable degree of approximation, the probable returns under any proposed schedule and rates, a close adherence to former schedules was necessary. A radical change in the schedule, such as a charge to a universal meter rate schedule, could not be made, because no data was available
417 on which to base an estimate of the probable income under such schedule. This situation limited the board to fixing rates for a 'flat rate schedule' to cover a period of twenty years.

3rd. The income of the company is not produced by schedule rates alone. The general franchise stipulations, fixing hydrant rentals and terms for use of water for municipal purposes, (such as sprinkling streets, flushing sewers, etc., etc.,) either produce revenue or require free water. This situation made it necessary for the board to know under what terms the 'city would get water' before they could fix new schedule rates, that would give 'fair, just and reasonable returns upon a fair and reasonable valuation' of the property. In short, the Board could not consistently estimate the probable revenue under new schedule rates, when these rates were not the basis of the entire revenue.

4th. The attention of both parties to the agreement, under Ordinance No. 163, was called to this situation during sessions of the Board in Denver, in November and December, 1907. Mr. W. P. Robinson for the company and myself for the city, acting as a committee took up the consideration of the water rates problem. The company gave us access to its records, in order that the board of appraisers might be reliably informed, of the revenue producing items of previous schedules and the income and expenses of the company. Full data was compiled and a schedule prepared giving the results of our study of the problem and of our joint experience in water works management. The city and board of appraisers received copies of our report. As we were not furnished with an agreement as to the terms on which the city would get water, we assumed for the purposes of our report that the city would pay for all the water used for municipal purposes, and not shift the expense of this service to private consumers. It costs money to collect, prepare and distribute water (especially so where it is necessary to pur-

chase water rights) and free water to the city simply means additional rates to private consumers.

5th. When the Board took up the question of rates for a twenty year schedule I submitted the result of the work of Mr. Robinson and myself with the opinion, that the Board could not accurately predict future requirements for water, and the conditions of its use, for the next twenty years, and that, in order to insure fair play, a provision in the proposed contract, to be submitted by the company, should be made to re-adjust the rates from time to time during the life of the contract. I recommended the adoption
418 of a system of accounting which would provide for keeping the returns on the property at the prevailing rate of interest. The Board could not enforce such a provision and the rates as submitted being unsatisfactory, an effort was made to adopt a universal meter rate schedule, based on the system now in use in some cities of Germany. This effort failing, an effort was next made to agree on a flat rate schedule. As the board was unable to agree on any rates that appeared fair to all parties concerned and that would remain fair during a period of twenty years, we finally agreed upon the report of March 20, 1909, a copy of which is contained in the last part of this report.

6th. The failure to agree on a schedule of rates was not due to any action of the company. The parliamentary situation was as follows: At the time the rates question was up for consideration one representative for the city and one for the company had not agreed to the 'fair cash value' of the plant. As counsel representing the city and the company, both held that the fair cash value was the only proper basis for estimating the fairness of the return produced by a schedule of water rates, the two members of the board dissenting at that time to the value of the plant as found by the majority, could not consistently figure on rates, on the majority 'fair cash value' basis. This left the question of rates in the hands of three members of the board. As the rates proposed by Mr. Robinson and myself as a committee were not satisfactory to the city, and further, as I would not agree to any rates without a provision that would insure fairness to all parties during a twenty year period, I proposed that the board report its inability to accomplish an impossible task, which proposition resulted in the report hereinafter quoted. The failure to get a report on a twenty year flat rate schedule is due to the fact that city and the company, although cautioned in advance (November and December 1907) did not agree on terms for water for city purposes and a provision that would insure 'fair play' for the twenty year period. Personally I would not agree to a schedule that would bankrupt the company at the outset, or a schedule that would produce a recurrence of former contentions in less than half of the proposed period which the schedule had to run.

The history of the water works undertaking in Denver did not warrant the adoption of a schedule of water rates, that would balance the profits of the last ten years of a twenty year period against the losses of the first ten years, so as to produce a fair return on the whole twenty year period. Further the ordinance did not authorize such a schedule.

7th. My report to the Mayor subsequent to the final adjournment of the board was as follows:

Hon. R. W. Speer, Mayor, Denver, Colorado.

DEAR SIR: Confirming telegrams of Mr. Stearns and myself from New York, The Board of Appraisers and Arbitrators concluded to report as follows:

'The undersigned, Board of Appraisers and Arbitrators, have previously reported to you, under date of March 20, 1909, upon the value of the plant and property owned and used by the Denver Union Water Company, respectfully present in continuation of said report, that after long and careful considerattion, they are unable to agree upon a schedule of rates complying with all the conditions and limitations imposed by Ordinance No. 163, Series of 1907, among which are that the said rates shall be definitely fixed, and easily and plainly understood, and be fair and just and reasonable rates for the water supplied and services performed, and give to said company fair, just and reasonable returns upon a reasonable valuation of its property, and remain fair to both the company and the consumer during a period of twenty years.'

The difficulty which we encountered was, that a schedule of water rates which would give fair return on the property at the beginning of the twenty year period would in all probability bring in a return that would be unfair in from five to seven years and would inside of ten years, bring about a repetition of the strife and contention that has occurred in the past. As the Board had no control (and very properly so) over the term of the franchise they could not devise a flat rate schedule that would be fair for twenty years. In short, the Ordinance imposed a duty on us which we could not perform and our only course was to decline an impossible task. This is the situation as I see it and it is also the position which I took during the discussion of the rate problem.

Other members had different views, of course, but we all agreed on the main point as shown by our report.

In case I can be of any further service to the city or to the city and company jointly on the question of water rates I shall be pleased to render what aid I can.

Yours very truly,

(Signed) M. L. HOLMAN.

8th. In conclusion permit me to suggest, that if the electors of the city and county of Denver decide to exercise their option to purchase the plant, the return from the schedule of rates, if the water works is to carry itself financially, will have to be in excess of the rates recommended by Mr. Robinson and myself, as a committee, in order to provide a sinking fund, for the retirement of the purchase bonds, under your present state law. It will further be necessary to raise money for extensions of the water works plant, that should have been constructed several years ago. Denver has 'arrived' and should now make reasonable pro-

visions for its future water supply along lines that indicate a permanency of occupation and a continuity of policy not heretofore apparent. This will require the present investment of money against future requirements for water and consequently an increased income to meet interest on bonds issued for new work. Long life bonds should be issued for new work, as well as for the purchase price, in order to give sufficient time for the financial problem to work out, or in other words, the expense of the undertaking should be equitably distributed over the period of its useful life. To make a structure like Cheesman Lake 'pay out' in twenty years is unjust to the present generation of water takers.

The company or the city should now be at work on plans for the future supply of the city, and the plans should be made with a view of permanency, or life of structure, that will keep the total cost (fixed charges, authorization, operation, etc.) down as low as practicable.

The plans which should be adopted for future extensions can not be outlined until after an exhaustive study of the locality and water right records shall have been made.

Respectfully submitted,

(Signed) M. L. HOLMAN,
Consulting Engineer.

And further affiant saith not.

CHARLES S. THOMAS.

Subscribed and sworn to before me this 31st day of August, A. D. 1910.

My commission expires Sept. 26th, 1911.

[NOTARIAL SEAL.] I. ANSON WEST,
Notary Public.

Endorsed: No. 5572. In Chancery. In the United States Circuit Court of the district of Colorado. The New York Trust Company, complainant, versus The City and County of Denver, et al., Defendants. Affidavit of Charles S. Thomas. Filed Sept. 5, 1910. Charles W. Bishop, Clerk. Thomas, Bryant & Malburn, Attorneys for —— ——, 621-627 Ernest and Cranmer Bldg., Denver, Colo.

421

In the Circuit Court of the United States for the District of Colorado.

No. 5572.

THE NEW YORK TRUST COMPANY, a Corporation, Complainant,
vs.
THE CITY AND COUNTY OF DENVER, a Municipal Corporation, et al., Defendants.

Affidavit of E. B. Thrush.

STATE OF COLORADO,
City and County of Denver, ss:

E. B. Thrush, being duly sworn, deposes and says; he is permit clerk in the office of the Board of Public Works of the city and county of Denver, which board, under the charter of said city and county and section 83 thereof, has the management and control "of all excavations in the streets, alleys and other highways or public places, the cleaning of streets, the erection, alteration or removal of poles, the location and stringing of wires, laying of tracks, pipes and conduits, whether done by the city and county or other persons." And which board is required by section 1737 of the Municipal Code of said city and county to grant to any person or corporation, possessing by ordinance, resolution or contract general or special power to excavate in or upon any street, alley or walk of the city and county of Denver, a permit to do such work as is allowed by the city and county. And it is required by section 1741 of said municipal code that said board of public works shall keep a record of all applications so made and of permits so issued. And it is also provided by section 1734 of said municipal code that,

Before any person, persons, firm or corporation shall dig up, open or excavate, or cause to be dug up, opened or excavation to be made in any street, alley, walk, or public place of the city and county of Denver, for the purpose of laying, removing, interfering with or repairing any gas, water, or other pipes, or connections between any pipes and mains, or for the purpose of inspecting any gas, water, other pipes, mains or connection, between said pipes and mains or any cesspool or house connection, or for grading, obtaining material for paving, or for the manufacture of brick, or for the purpose of repairs, such person, persons, firm or corporation shall first obtain a permit therefor from the board of public works.

Affiant further says that on the 30th and 31st days of August 1910, under the direction of the board of public works aforesaid, he examined the record of permits issued, if any, upon
422 the application to The Denver Union Water Company, for excavations to be made under the ordinance specified and scheduled in sheets A, B and C hereto attached and certified by the city clerk, and from such examination so made by him found permits were issued as follows, to said company upon its application duly filed:

Ordinance No.	Year.	Permit No.	Date of issue.
98	1902	28649	April 19, 1909.
22	1907	23292	June 14, 1907.
"	"	23293	" " "
60	"	23294 23296	" " "
93	"	25639	April 29, 1908. (W. 14th Ave. & Raritan.)
108	1907	32404	June 30, 1910.
116	"	25343	April 6, 1908.
"	"	31404	March 18, 1910.
"	"	31405	" " "
"	"	32582	June 23, 1910.
83	1909	31759	April 20, 1910.
84	1909	29824	September 17, 1909.

And affiant further says he found no report of any other permits issued under the ordinances scheduled and referred to upon said annexed sheets A, B and C except as just above enumerated and set forth and to the best of his belief in the limited time allowed for examination that no other permits were issued under ordinances enumerated in sheets A, B and C hereto attached.

E. B. THRUSH.

Subscribed and Sworn to before me this 1st day of September, A. D. 1910.

My commission expires April 12, 1911.

[NOTARIAL SEAL.] FRANK J. EMPEROR,
Notary Public.

STATE OF COLORADO,
City and County of Denver, ss:

I, Burt F. Davis, clerk of the city and county of Denver, in the state of Colorado, do hereby certify that I have examined the record of city ordinances now in my possession as clerk of said city and county, and the annexed sheets and pages marked respectively A, B, and C, constitute a statement of certain ordinances that have been passed by the council of the city and county of Denver and
423 signed and approved by the mayor, providing for extension of mains and setting of fire hydrants in said city and county of Denver by The Denver Union Water Company beginning with No. 51 of the series of 1902, and coming down to the present time. That sheet C. contains a complete list of all the ordinances passed by the council of the city and county of Denver and approved by the mayor of said city providing for extension of mains or placing of hydrants by The Denver Union Water Company since the date of the last item appearing on sheets B hereto attached.

Witness my hand and official seal this 31st day of August, A. D. 1910.

[Seal City and County of Denver.]

BURT F. DAVIS,
Clerk of the City and County of Denver,
By J. A. DAWSON, *Deputy.*

"A."

Statement of Ordinances that Have Been Passed for Extension of Mains and Setting Fire Hydrants.

Ord. No.	Year.	On street.	From	To	Hydts.
51	1902	W. 39th Ave.	Gallup Ave.	Bryant St.	
		Bryant St.	W. 39th Ave.	W. 40th Ave.	
		W. 40th Ave.	Bryant St.	Clay St.	
98		13th St.	Wazee St.	Wynkoop	
57	1905	41st Ave	Garfield	Jackson	
		Jackson St.	41st Ave.	42nd Ave.	
27	1906	Meade St.	W. Bayaud	W. 1st	
51	1906	Meade St.	W. 14th	W. 13th	
61	1906	W. 46th Ave.	Alcott St.	Quivas St.	
116	1906	Clear Ck Ave.	W. 32th Ave.	W. 40th Ave.	
128	1906	2nd St.	Larimer St.	Wazee St.	
		Wazee St.	2nd St.	4th St.	
5	1907	Alcott St.	W. 46th Ave.	W. 47th Ave.	
22	1907	2nd Ave.	Bellaire St.		Hydt
22	1907	5th St.	Birch St.		Hydt
23	"	Newton St	W. 38th Ave.	W. 39th Ave.	
33	"	S. Ogden St.	Iowa Ave.	Asbury Ave.	
33	"	Colorado	S. Clarkson	S. Lafayette	
43	"	W. 13th Ave.	Galapago St.	Inca St.	
		W. 12th Ave.	Inca St.	Fox St.	
		Galapago St.	W. 10th Ave.	W. 13th Ave.	
		Fox St.	W. 9th Ave.	W. 12th Ave.	
46	"	W. 12th Ave.	Decatur St.	Bryant St.	
		Bryant St.	W. 12th Ave.	W. 11th Ave.	
58	"	Adams St.	32nd Ave.	34th Ave	
60	"	Quebec St.	6th Ave.		Hydts.
61	"	Meade St.	W. 38th	W. 41st Ave.	
62	"	44th Ave.	Clayton St.	Adams St.	
63	"	40th Ave.	High St.	Race St.	
		Race St.	40th Ave.	350 ft. So.	
64	"	Gilpin St.	6th Ave.	1st Ave.	
424					
73	1907	Williams St.	6th Ave.	4th Ave.	
73	"	High St.	5th Ave.	4th Ave.	
74	"	Raleigh St.	W. 38th Ave.	W 41st Ave.	
75	"	Gilpin St.	Alameda Ave.	Cedar Ave.	
87	"	Vallejo St.	W. 38th Ave.	W. 41st Ave.	
93	"	W. Colfax Ave.	Raritan St.		Hydt.
94	"	Delaware St.	W. 8th Ave.	W. 9th Ave.	
95	"	Tennessee	S. Clarkson		Hydts.
96	"	S. Franklin	Alameda Ave.	Virginia	

"B."

Statement of Ordinances that Have Been Passed for Extension of Mains and Setting Fire Hydrants (Continued).

Ord. No.	Year.	On street.	From	To	Hydts.
105	1907	Quitman St.	W. 44th Ave.	W. 46th Ave.	
106	"	Newton St.	W. 49th Ave.	W. 51st Ave.	
"		Osceola St.	"	"	
"		Perry St.	W. 50th Ave.	"	
"		Quitman St.	W. 48th Ave.	W. 50th Ave.	
"		Raleigh St.	"	"	
"		Stuart St.	"	W. 51st Ave.	
107	1907	W. Cedar Ave.	Blvd. F.	Meade St.	
108	1907	S. Williams St.	Miss. Ave.	Louis Ave.	
"		S. High St.	"	"	
"		S. Race St.	Louis Ave.	Ark. Ave.	
"		S. Vine St.	"	"	
"		S. Gaylord St.	"	"	
"		S. York St.	"	"	
109	1907	Quitman St.	W. 38th Ave.	W. 44th Ave.	
111	1907	Cherokee St.	W. 44th Ave.	W. 45th Ave.	
		Cahita Ct.	W. 43rd Ave.	W. 45th Ave.	
114	1907	Decatur St.	W. 8th Ave.	W. 10th Ave.	
116	1907	Downing St.	3rd Ave.	1st Ave.	
116	1907	Marion St.	"	"	
"		Humboldt St.	"	"	
"		1st Ave.	Downing St.	Gilpin St.	
122	1907	St. Paul St.	12th Ave.	14th Ave.	
129	1907	16th St.	N. W. of Bassett	Platte Riv.	Hydts
151	1907	Humboldt St.	7th Ave.	8th Ave.	
152	1907	Meade St.	W. Bayaud	W. 1st Ave.	
162	1907	W. 39th Ave.	Blvd. F.	Irving St.	
179	1907	W. 10th Ave.	King St.	Lowell Blvd.	
		Lowell Blvd.	W. 10th Ave.	W. 12th Ave.	
185	1907	W. 14th Ave.	Canosa Ct.	Paul Ct.	
		Paul Ct. & St.	W. 14th Ave.	Howard Pl.	
197	1907	W. 1st Ave.	Lipan St.	Mariposa	
		Mariposa St.	W. 1st Ave.	W. 3rd Ave.	
199	1907	S. Emerson	Mississippi	Arizona Ave.	
199	1907	So. Cherokee	at W. Florida		Hydt.
200	1907	Osceola St	W. 2nd Ave.	W. 3rd Ave.	
4	1908	Java Court	W. 26th Ave.	W. 27th Ave.	
5	1908	W. 47th Ave.	Tennyson St.	Raleigh St.	
6 & 7	1908	Stuart St.	W. 14th Ave.	W. 12th Ave.	

425 "C."

Statement of Ordinances that Have Been Passed for Extension of Mains and Setting Fire Hydrants.

Ord. No.	Year.	On street.	From	To	Hydrants.	Under ordinance.
28	1908	Detroit	4th Ave.	5th Ave.	One	44 of 1890
29	"	Yates	W. 45th Ave.	W. 46th Ave.		
30	"	Jackson	Colfax Ave.	17th Ave.	two	" " "
		Monroe	" "	" "	two	" " "
		Harrison	" "	" "	two	" " "
41	"	Fillmore	10th Ave.	12th Ave.	two	" " "
53	"	Williams	7th Ave.	8th Ave.	two	" " "
30	1909				one	54 of 1894
19	"	Fox	W. 38th Ave.	W. 34th Ave.	two	44 of 1890
83	"	Ivy	Colfax Ave.	Mt. View Boul.	five	" " "
		Leyden	" "	" " "	five	" " "
84	"	Walnut	13th St.	Cherry Crk.	two	" " "

Endorsed: 5572. U. S. Circuit Court, district of Colorado. The New York Trust Company vs. The City and County of Denver et al. Affidavit of E. B. Thrush and Certificate of Burt F. Davis, City Clerk. Filed Sep. 5, 1910. Charles W. Bishop, Clerk.

In the Circuit Court of the United States for the District of Colorado.

No. 5572.

THE NEW YORK TRUST COMPANY, a Corporation, Complainant,
vs.
THE CITY AND COUNTY OF DENVER, a Municipal Corporation, et al., Defendants.

Affidavit.

STATE OF COLORADO,
City and County of Denver, ss:

Armour C. Anderson, being duly sworn, deposes and says:

He is a member and president of the Public Utilities Commission of the City and County of Denver, defendants in the above entitled action; that on the 31st day of May, 1910, by the direction of said commission and as its president he caused to be delivered to Hon. David H. Moffat president of The Denver Union Water Company, and as a service upon said company a letter from said Public Utilities Commission within the purview of section 264 A of the Charter of the City and County of Denver, offering to turn over and deliver to said The Denver Union Water Company seven
426 million dollars in bonds of the city and county of Denver, to be issued under the terms of said section 264 A, for said company's water plant; that within a few days thereafter affiant was advised by the newspapers of the city and county of Denver,

and two or more thereof, that the firm of Vaile, McAllister & Vaile had been employed by said The Denver Union Water Company and were advising said company accordingly. Within a few days after such information reached affiant he met Hon. Joel F. Vaile a member of said firm, on the street in said city and county and spoke to him briefly about the matter, and inferred from his answers in such conversation, that said firm was representing The Denver Union Water Company in the matter of preparing an answer to our letter aforesaid; that acting under this impression so received affiant on the 9th day of June, 1910, at about two o'clock on the afternoon of said day, telephoned from the office of the Public Utilities Commission to the office of Vaile, McAllister & Vaile in the Equitable Building, in the city and county of Denver, and being connected with the room of Hon. Joel F. Vaile and recognizing his voice in answer to affiant's inquiry affiant asked of him if the letter from the Denver Union Water Company in answer to our letter of May 31, 1910, was ready, whereupon said Joel F. Vaile replied that it was ready and had been sent to David H. Moffat for his signature and would reach us in a half hour at our office, or words to that effect, and thereafter, and within a half an hour from said conversation by telephone the letter in answer to ours of May 31, 1910, and bearing date June 9, 1910, signed by The Denver Union Water Company by David H. Moffat, president, reached us at our office aforesaid, 206 City Hall Building, and affiant has every reason to believe and does believe that this is the same letter referred to by Hon. Joel F. Vaile in his conversation that afternoon about one half hour previous to the receipt of such letter and affiant also has reason to believe and does believe that said letter was prepared in the office of Vaile, McAllister & Vaile by the Hon. Joel F. Vaile or one of his partners and associates.

ARMOUR C. ANDERSON.

Subscribed and Sworn to before me this 29th day of August, A. D. 1910.

My commission expires February 25, 1911.

PATTIE DENNE,
Notary Public.

[NOTARIAL SEAL.]

Endorsed: 5572. In the Circuit Court of the United States for the district of Colo. No. 5572. The New York Trust Com-
427 pany, Complainant vs. The City and County of Denver, et al., Defendants. Affidavit of Armour C. Anderson. Filed Sep. 5, 1910. Charles W. Bishop, Clerk.

In the Circuit Court of the United States for the District of Colorado.

No. 5572.

THE NEW YORK TRUST COMPANY, a Corporation, Complainant,
vs.
THE CITY AND COUNTY OF DENVER, a Municipal Corporation et al., Defendants.

Affidavit of Ellis Meredith.

STATE OF COLORADO,
City and County of Denver, ss:

Ellis Meredith, being duly sworn, deposes and says: She is the president of the Election Commission of the city and county of Denver, and familiar with the business of said commission, and especially with all matters pertaining to the special election provided by section 264*a* of the Charter of the city and county of Denver to be held September 6th, 1910, and called by Ordinance of said city and county to be held on said date, which ordinance is set out by a copy as Exhibit E attached to the bill of complaint in this suit.

Affiant states that about two thirds of the expense of said election has already been incurred by said Election Commission under and in compliance with law, as follows, to-wit:

Registrars and registration places	$14770.00
Salaries	3406.61
Supplies as per requisitions	3783.95
	$21960.56

That the election notices have all been sent out and posted as required by law, the lumber for booths has been ordered, places for election rented, and notices of election have been furnished to appear in four newspapers beginning August 31, 1910. That the judges and clerks have all been named and nothing remains to be done but sending out the poll books, official ballots and other supplies to the judges and holding the election on the day appointed therefor, and the commission estimates that the remaining expense will be about one half of that already incurred.

Affiant further says that if the holding of said special election as called for Tuesday, September 6, 1910, shall be enjoined and
428 prohibited by this Honorable Court the expense already incurred therefor will be a total loss to the city and county of Denver. And she is advised and the said election commission and the members thereof, are advised that it is a serious question whether another election can be called, ordered, or held under existing provisions of the charter of the city and county of Denver, for the object and purpose for which said special election has been called, and also

whether it will be lawful to submit at any general city election in said city and county, the question now provided to be submitted at said special election so called for September 6, 1910.

ELLIS MEREDITH.

Subscribed and Sworn to before me this 31st day of August, A. D. 1910.

[Seal U. S. District Court.]

CHARLES W. BISHOP, *Clerk.*

Endorsed: 5572. In the Circuit Court of the United States for the District of Colo. No. 5572. The New York Trust Company, Complainant, vs. The City and County of Denver et al., Defendants. Affidavit of Ellis Meredith. Filed Sep. 5, 1910. Charles W. Bishop, Clerk.

In the Circuit Court of the United States for the District of Colorado.

No. 5572.

THE NEW YORK TRUST COMPANY, a Corporation, Complainant,
vs.
THE CITY AND COUNTY OF DENVER, a Municipal Corporation, et al., Defendants.

Affidavit of Matthew F. Murray.

STATE OF COLORADO,
City and County of Denver, ss:

Matthew F. Murray, being duly sworn, deposes and says; he is the secretary of the Election Commission of the city and county of Denver and as such has in his custody the books, papers and records of said election commission and its predecessors in office since the creation of said commission and election of the members thereof by adoption of the charter of the city and county of Denver on March 29, 1904; that from the records in said office it appears that at the regular election held according to law on the 17th day of May, 1910, there was submitted to the qualified tax paying electors of said city a proposed franchise for and on behalf of The Denver Union Water Company and for the maintenance and operation of a water plant within the limits of said city and county of Denver, and he
429 annexes hereto and makes a part of this his affidavit a copy of said proposed franchise so submitted at said election to the qualified tax paying electors aforesaid.

Affiant further says that said election was not a special election within the scope or purview of the charter of the city and county of Denver or other statutes or provisions of law bearing upon said subject, but was a general election at which three members of the Board of Supervisors of the city and county of Denver were voted

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for and duly elected, and at which sixteen members of the Board of Aldermen, being the whole membership of said board, were voted for and duly elected, and also three members of the Election Commission were voted for and duly elected, and have since the issue of their certificates of election been holding the office of members of said election commission, duly qualified as such and are now holding the same.

Affiant further says that at said general election the proposed franchise so submitted, and a copy of which is hereto attached and made a part of this affidavit, was duly voted upon by statement pro and con placed upon the ballot in accordance with an ordinance of the city council duly adopted, passed and approved in that behalf, and thereafter the votes cast upon said question were duly canvassed and certified by and under the direction of said election commission, to-wit, the predecessors in office of the present election commission, and that it appears from the records now in the custody of this affiant as secretary of said election commission, that said proposed franchise was rejected and defeated by the vote of the qualified tax paying electors aforesaid by a majority of 3985, to-wit, 9,737 votes were cast for said proposed franchise and 13722 votes were cast against the same.

MATTHEW F. MURRAY.

Subscribed and Sworn to before me this 31st day of August, A. D. 1910.

My commission expires February 25, 1911.

[NOTARIAL SEAL.] PATTIE DENNE,
Notary Public.

(Here follows ballot sheet marked pages 430 and 431.)

432 Endorsed: 5572. U. S. Circuit Court, District of Colorado. The New York Trust Company vs. The City and County of Denver et al. Affidavit of Matthew F. Murray. Filed Sep. 5, 1910. Charles W. Bishop, Clerk.

Sixty-first Day, May Term.

TUESDAY, *September 6th, A. D.* 1910.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the third day of May, A. D. 1910.

5572. In Chancery.

THE NEW YORK TRUST COMPANY
vs.
THE CITY AND COUNTY OF DENVER; ROBERT W. SPEER, as Mayor of the City and County of Denver; Burt F. Davis, as Clerk of said City and County of Denver; Albion K. Vickery, as Auditor of said City and County of Denver; Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows, as Members of and Constituting the Public Utilities Commission of said City and County of Denver; Ellis Meredith, A. E. Mauff, and Harry Petrie, as Members of and Constituting the Election Commission of said City and County of Denver; The Denver Union Water Company, and The South Platte Canal and Reservoir Company.

Bill for Injunction and for Other Relief.

This cause coming on to be heard before the court upon the motion and application of the above named complainant for an order and writ of injunction as prayed for in the bill of complaint herein which motion and application was filed in this court on the 22nd day of August, 1910; and upon the order of this court entered upon that date setting said motion and application for hearing before the court on Wednesday, the 31st day of August, 1910, at 10 o'clock a. m. and the said hearing on motion and application having been commenced before the court upon the said day and hour, and having continued from that time to the present day; and it appearing to the court that notice of said motion and application for injunction was duly served upon each and all of the defendants above named on the 22nd and 23rd days of August, 1910; and the complainant appearing by J. Markham Marshall, Esq., and Henry McAllister, Jr., Esq., two of its solicitors, the defendants the City and County of Denver, a municipal corporation, Robert W. Speer as mayor of said City and County of Denver, Burt F. Davis, as clerk of said City and County of Denver, Albion K. Vickery as auditor of said City and County of Denver, Ellis Meredith, A. E. Mauff, and
433 Harry Petrie as members of and constituting the Election Commission of said City and County of Denver, appearing by Harry A. Lindsley, Esq., the City Attorney of said City and County of Denver, and George Q. Richmond, Esq., as assistant City Attorney of the said City and County of Denver, and the defendants Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows, as members of and constituting the Public Utilities Commission of said City and County of Denver, appearing by Charles S. Thomas, Esq.,

and Charles W. Waterman, Esq., their solicitors, and The Denver Union Water Company, a corporation, and The South Platte Canal and Reservoir Company, a corporation, appearing by Gerald Hughes, Esq., Clayton C. Dorsey, Esq., William V. Hodges, Esq., and A. M. Stevenson, Esq., their solicitors; and the said motion and application coming on to be heard upon the bill of complaint and the answer of the defendant The Denver Union Water Company, and upon affidavits presented and filed by the respective parties, and the court having heard and considered the allegations of the bill and the proof submitted by the respective parties, and the argument of counsel, and being now fully advised in the premises;

It is, upon motion of the complainant, ordered that the complainant shall have and be deemed to have the benefit of the affidavits and documentary evidence filed herein by the defendant The Denver Union Water Company in support of its cross-bill and its motion and application for injunction based thereon;

And its is thereupon ordered, adjudged, and decreed, that upon the filing herein by the said complainant of its injunction bond, conditioned according to law, and with surety or sureties to be approved by the clerk of this court, in the sum of one hundred thousand dollars ($100,000) wherein the defendants hereinafter named shall be obligees, the said defendants, the City and County of Denver, a municipal corporation, Robert W. Speer, as mayor of the City and County of Denver, Burt F. Davis, as clerk of said City and County of Denver, Albion K. Vickery, as auditor of said City and County of Denver, and Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows as members of and constituting the Public Utilities Commission of said City and County of Denver, and each of them, and the respective successors in office of them, and each of them, and the officers, agents, servants, employés, representatives and confederates of them and each of them, be and they hereby are enjoined and restrained, until the further order of this court, from issuing or attempting to issue, or signing, sealing, attesting, registering, or delivering any bonds, either in the amount of eight
434 million dollars ($8,000,000) or in any amount whatsoever, under or in pursuance of or under the color of authority of a certain election held or to be held on the first Tuesday in September, 1910, in the said city and county of Denver, or under or by virtue of or under the color of authority of the so-called section 264 A of the charter of said City and County of Denver, and which bonds, according to the terms of said section 264 A of said charter are to be sold or used for the construction and putting in operation or either thereof, of a new system of water works for said city and county of Denver; and also from doing or attempting to do any act or thing whatsoever looking to or tending to accomplish or assist in the accomplishment of issuing, sealing, attesting, registering, delivering, selling, disposing of or contracting for the sale or disposition of, said, or any, bonds for the above purpose, or looking to or tending to accomplish or assist in the accomplishment of the construction and putting in operation or either thereof, of such new system of water works for said city and county of Denver; or from taking any

steps whatsoever looking to the construction of a municipal water plant for said city and county of Denver.

And it is further ordered that upon the filing and approval of the bond aforesaid, a writ of injunction shall issue out of this court, under the hand of the clerk thereof, with the seal of the court thereunto affixed, enjoining and restraining the said defendants and each of them, and their respective successors in office, and the officers, agents, servants, employés, representatives, and confederates of each of them, in the particulars aforesaid; provided, however, that this order of injunction, and the writ of injunction hereby authorized, shall not restrain or prohibit or be deemed to restrain or prohibit the holding of the said election for the purpose aforesaid, now set for the first Tuesday in September, 1910, or the counting of the votes cast at said election or the taking of such steps as may be necessary to certify and canvass the returns of such election.

5572. In Chancery.

THE NEW YORK TRUST COMPANY

vs.

THE CITY AND COUNTY OF DENVER, ROBERT W. SPEER, as Mayor of the City and County of Denver; Burt F. Davis, as Clerk of said City and County of Denver; Albion K. Vickery, as Auditor of said City and County of Denver; Armour C. Anderson, Edwin Van Cise, and A. Lincoln Fellows, as Members of and Constituting the Public Utilities Commission of said City and County of Denver; Ellis Meredith, A. E. Mauff, and Harry Petrie, as Members of and Constituting the Election Commission of said City and County of Denver; The Denver Union Water Company, and The South Platte Canal and Reservoir Company.

435 Bill of Injunction and for Other Relief.

This cause coming on to be heard on the application of the cross-complainant, The Denver Union Water Company, for an interlocutory injunction against the defendants the City and County of Denver, a municipal corporation; Robert W. Speer as mayor of the City and County of Denver, Burt F. Davis, as clerk of said City and County of Denver; Albion K. Vickery as auditor of said City and County of Denver, Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows, as members of and constituting the Public Utilities Commission of said City and County of Denver; Ellis Meredith, A. E. Mauff, and Harry Petrie, as members of and constituting the Election Commission of said city and county of Denver, upon the verified bill of The Denver Union Water Company, a corporation, the cross-complainant, against the defendants in the original bill, except The South Platte Canal and Reservoir Company, and also against the complainant The New York Trust Company, and upon the affidavits of the respective parties filed herein, the matter having been argued by the respective counsel for the various parties, J. Markham Marshall, Esq., and Henry McAllister, Jr., Esq., appearing for

the complainant The New York Trust Company; Charles S. Thomas, Esq., Charles W. Waterman, Esq., appearing for the defendants Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows as members of and constituting the Public Utilities Commission of said city and county of Denver; Harry A. Lindsley, Esq., and George Q. Richmond, Esq., appearing for the city and county of Denver, Robert W. Speer as mayor of said city and county of Denver, Burt F. Davis as clerk of said city and county of Denver, Albion K. Vickery as Auditor of said city and county of Denver, and Ellis Meredith, A. E. Mauff and Harry Petrie as members of and constituting the Election Commission of the said city and county of Denver; and Gerald Hughes, Esq., Clayton C. Dorsey, Esq., William V. Hodges, Esq., and A. M. Stevenson, Esq., appearing for The Denver Union Water Company; the matter having been fully argued by the various counsel, and the court having considered the matter and being now fully advised in the premises;

It is hereby adjudged and decreed by the court that the defendants The City and County of Denver, a municipal corporation, Robert W. Speer as mayor of the city and county of Denver, Burt F. Davis as clerk of the city and county of Denver, Albion K. Vickery as auditor of the city and county of Denver, Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows, claiming to be and acting as members of and claiming to constitute and act as the Public Utilities Commission of said city and county of Denver, and
436 each and every of them, their respective successors in office, and each of them, and all officers, agent, servants, employés representatives and confederates of them or either of them, be and they are hereby, enjoined from issuing or attempting to issue the bonds or any of the bonds described and set forth in section 264 A of the charter of the City and County of Denver, and ordinance 98 of the series of 1910, for any purpose whatsoever, and from interfering or attempting to interfere with or obstructing or attempting to obstruct the defendant The Denver Union Water Company in the exercise and enjoyment of its contract and franchise right under said ordinance 44 of the series of 1890 and 163 of the series of 1907, and otherwise, and from doing or attempting to do any act or thing tending to accomplish any such purposes, until the further order of the court in the premises.

It is further ordered by the court that upon the filing by the defendant The Denver Union Water Company of a good and sufficient bond conditionad according to Law, in the sum of one hundred thousand dollars ($100,000) with sureties to be approved by the clerk of this court, a writ of injunction issue against the defendants above named, and enjoining and restraining them and each of them as hereinabove provided.

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the Circuit Court of the United States in and for the said District

No. 5572. In Chancery.

THE NEW YORK TRUST COMPANY, Complainant,
vs.
THE CITY AND COUNTY OF DENVER et al.

Bill.

and

THE DENVER UNION WATER COMPANY, Cross Complainant,
vs.
THE CITY AND COUNTY OF DENVER et al., Defendant.

Cross Bill.

At the hearing upon the application of complainant and cross-complainant for writ of injunction, heard in said court on Wednesday, the 31st day of August, A. D. 1910, and from day to day thereafter, the defendants resisting said applications, and each of them introduced and relied, among other things, upon the record now in the Supreme Court of the State of Colorado of The Denver Water Company, Appellant, vs. The Citizens' Water Company, Appellee, and numbered 2840 on the dockets of said court, the said
437 case being entitled, "The Denver Water Company, Appellant, vs. The Citizens Water Company, Appellee."

The complaint in said cause recites in full the contract of the 9th day of May, A. D. 1874, between the city of Denver and the Denver City Water Company, a copy of which is attached to the affidavit of William P. Robinson for the cross-complainant, and alleges its assignment to the plaintiff Denver Water Company. That the principal consideration due to it and its predecessor from the said city of Denver, and which induced its predecessor to execute said contract, was the grant therein made to it by the said city of Denver of the sole and exclusive right to lay pipes for the distribution of water within the city limits of the said city, and any additions thereafter to be made thereto, for the said period of seventeen years; and that until the occurrence of matters and things hereinafter alleged, the said exclusive rights so granted and conferred upon it for such valuable considerations have always been observed and respected, and in all things fully enforced and regarded.

That for the purpose of carrying out and executing its terms and conditions, plaintiff and its predecessor had, since the date of the contract, constructed at great expense large reservoirs for the purpose of holding water, and expensive plants and machinery for

pumping and forcing water into its mains, acquired additional water rights and privileges, and constructed miles of water mains and branches connecting therewith throughout the limits of the city, and additions thereto, and in nearly all the streets thereof, to the extent of one hundred miles and more, and engaged in giving, and had given, and intended in the future to give, to the city and its citizens an ample and complete supply of water for their needs, and had expended in and about said mains and acquisitions of property not less than $2,000,000.

That in laying its mains through the streets of the city of Denver it had occupied, and had the right to occupy, said streets, and laid its pipes so as to supply adjoining property holders and the city with water, and intended within the next eighteen months to add to and improve its plant to meet the demands of the rapidly growing city of Denver by the laying of gravity and other pipes, increasing the capacity of its machinery and the extent of its water supply, by an expenditure of not less than $2,000,000, in order to do which it would require the exclusive underground use of the streets, avenues and other thoroughfares of Denver for that purpose.

The complaint further recited that the defendant Citizens' Water Company claimed the right to excavate and dig trenches
438 along, in and across all of the streets of the city of Denver, including those in which the plaintiff company had already laid its pipes, and to lay therein its own water pipes and mains, and from them to supply consumers and customers, notwithstanding the fact that all of its main streets are occupied with water pipes and mains of the plaintiff company, from which mains residents and occupants of buildings along the lines thereof are supplied with water under and by virtue of the contract aforesaid; and that the defendant herein claims said right by virtue of an ordinance of the city of Denver granting its said right, which ordinance was fully set forth in said complaint.

That the city of Denver was, and until the first day of May, 1891, would be wholly without any power, authority or right whatsoever to grant, give, convey or confer to or upon any corporation, individual or association the right to lay any pipes for the distribution of water within the city limits, and the value of the plaintiff's plant, franchises and property would be greatly diminished, its property destroyed, and its revenues crippled, and its franchises rendered almost wholly valueless, and the plaintiff be utterly remediless in the premises.

That it would be impossible for the defendant company to lay its mains and pipes without interfering with and crossing, and in many instances necessitating the removal of many of the water pipes of the plaintiff company, by lowering, raising or changing their position, all of which would result in a multiplicity of suits and great and expensive litigation, and great, lasting and irreparable damage.

Plaintiff further alleges that its present property rights and franchises were principally valuable because it possessed the only present available source and method of supplying the citizens of the city of Denver, and the city itself, with water for all purposes, and that by

reason of its possession of such a right it has been and is able to carry on its said business at fair and reaonable rates and with reaonable profit to itself; that if the defendant should be permitted to carry out its contemplated action within the next twelve months the plaintiff will require the use of the streets under its contract with the said city, and in laying its pipes will necessarily come in conflict with defendant company, each of whom will need and claim the right to use such parts and portions of said streets as to each one seems desirable and necessary, which would also breed expensive and wearing litigation and great and irreparable damage and injury. That the defendant company was organized to compel the plain-
439 tiff to pay it a large sum of money as a consideration of ridding itself of its annoyance and interference; that it had already made a proposal to sell its proposed franchise for a large sum of money, and in laying its pipes, mains and other appliances will come in conflict with the plaintiff whenever and wherever it sees an opportunity to do so, in the hope that the annoyance, trouble and destruction of property, litigation and great expense attendant thereon, will force plaintiff to buy it out and take a transfer of its pretended franchises as a choice between two evils. It therefore prayed for and a writ of injunction was granted, restraining the doing of the matters and things therein set forth.

On March 7th, 1890, the defendant company answered, alleging inter alia that so far as the contract of May 9th, 1874, purports to give or grant to the Denver City Water Company the sole or exclusive right to lay pipes for the distribution of water within the city limits of Denver or additions thereto to be made for seventeen years, the same was and at all times had been inoperative and void for the want of power in the said city of Denver to grant the same. Denied the existence of such exclusive right claimed by the plaintiff at any time. Defendant also denied the intentions and purposes charged against it by the plaintiff, or that any right or vested interest of the plaintiff will be destroyed by defendant's action in laying pipes, mains, etc., or that a mu*nici*plicity of vexatious or other suits will result therefrom, or that it ever made a proposal of sale of its franchise or rights as alleged against it.

Defendant further answering alleges that at the time of the making and the execution of the contract set out in said bill of complaint herein on the 9th day of May, 1874, neither the Mayor, the City Council, nor the city of Denver itself, had any right, power, or authority whatever to grant to the City Water Company, or any other company, any sole or exclusive right, grant or privilege to lay pipes for the distribution of water within the city limits of said city, or additions which might be made thereto, for seventeen years, or any other length of time; that so far as the said contract purports or attempts to grant such exclusive right it is wholly inoperative, null and void for want of such power. That said answer was verified by David H. Moffat, then the President of The Citizens' Water Company, on the 6th day of March, A. D. 1890. That afterwards, and on the 10th day of April, A. D. 1890, a judgment and decree

was entered in said cause against the said plaintiff company, dismissing its bill for want of equity, from which said appeal was duly taken, and which cause has been pending undetermined in said Supreme Court since, to-wit, the year 1890. That a part of
440 the record of said cause in said Supreme Court consists of the opinion of the Honorable Westbrooke S. Decker, Judge of said District Court, from which is quoted the following:

The next and most important question for consideration is, whether the city of Denver under its charter in force in 1874 had the power to grant the exclusive right to lay pipes for the distribution of water within the city of Denver, for seventeen years, which it undertook to give by its contract with the Denver City Water Company, dated May 9th, 1874.

Paragraph 59 of Sec. 3, article 6 of the charter, which gave to the city council power to provide the city with water, and which is the only section having reference to the subject, reads as follows:

To provide the city with water, to erect hydrants and pumps, to construct cisterns, to provide for and regulate the manner of introducing water for irrigation and other purposes; to regulate and provide for the construction for ditches, canals and gutters for conducting and distributing water through the city, and to keep the same in repair; to regulate the use of water by the inhabitants of the city for irrigating the soil; to build and construct ditches outside of the city limits for the purpose of bringing water into the city for the use of the inhabitants thereof, in such way and manner as shall, by the city council, be deemed for the best interest of the city, and to keep the same in repair; to bore artesian wells for the purpose of obtaining water for the city, at such places within or without the city of Denver, as may be procured for that purpose by the city council; to construct or purchase waterworks for the use of the city, and to enlarge their capacity from time to time and keep the same in repair, and generally to do whatever may be needful and necessary to be done in order to supply the city of Denver with water for fire, irrigation and other purposes, and regulate the same.

There are certain well established principles which will aid us in reaching a correct conclusion as to what was the extent of the power of the city under the foregoing provision of the charter.

Judge Dillon, in his work on Municipal Corporations, says a municipal corporation can exercise only the following powers:

First. Those granted in express words.

Second. Those necessarily or fairly implied, or incident to the powers expressly granted.

441 Third. Those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensible. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied. (Dillon Municipal Corporations, Sec. 89.)

Another eminent law writer has said, in speaking of the power of municipal corporations:

The general law under which they exist is the measure of the authority to be exercised, and the general disposition of the courts

in this country has been to confine municipalities with the limits that a strict construction of the grants of power in their charter will assign them. Thus applying substantially the same rule that is applied to charter of private corporations. The reasonable presumption is, that the state has granted in clear and unmistakable terms all it has designed to grant at all. (Cooley on Constitutional Limitations, p. 195.)

These are rules of construction that apply to the exercise of power in regard to matters of ordinary concern. Where, however, a municipal corporation undertakes to grant exclusive rights, as in the contract under consideration, and thereby divest itself of all power in that regard, then these rules are supplemented by another of no less importance, and that is, that monopolies and exclusive rights are not to be favored.

The streets of the city are for the use of the public. Water for irrigation, domestic and other purposes, in the city of Denver, is as much a common necessity as the streets. The only practical way in which water can be secured for and brought home to the city and its inhabitants, is through pipes laid in the streets. The legislature delegated to the city council of the city of Denver the authority to do what was necessary that the public might have good streets and a good and ample supply of water.

In the passage of the provision of the charter I have read, we have a right to presume that the legislature had in view the possible growth of the city, that its demand for water, for its use and that of its inhabitants, might greatly multiply. If in the power to provide the city with water, and generally to do whatever may be needful and necessary to be done for that purpose, was included the power to grant by contract the exclusive right to one company, or person, to lay water pipes in the street, then it certainly follows that it had the unlimited power, governed solely by its discretion, to do whatever it deemed to be needful and necessary to secure a supply of water. In other words, there was no limitation upon its power in that regard.

442 The irresistible conclusion therefore is, that whatever contract it might make under the exercise of its judgment, that it was needful and necessary, whether such contract was sufficient or not to meet the growing demand of the city, if not sufficient the common council having tied its hands, the city would be without a remedy. The faculties of man are not such as to enable him to look into the future and correctly calculate as to the future wants. Denver has seen its years of depression and great prosperity. The The re- — phesies of men as to what the city would ultimately become, have been controlled by the despair created by business stagnation and depression, or, on the contrary, by a sanguine hope created by business activity and prosperity.

If the plaintiff company had, under this contract, been unable to meet the necessities of the city and its inhabitants in the city's rapid growth, then to sustain the exclusive right to lay pipes in the city as contended for here, would place the city at the mercy of the water company, because, as the company controlled the only practical

means by which water could be brought home to the city and its inhabitants, no water supply could be obtained without the plaintiff's permission.

These observations suggest to my mind that the granting of exclusive rights, especially in relation to those subjects of municipal legislation which are indispensable to the health and happiness of the citizens, is the exercise of an unsafe, and, I might say, dangerous power, and that it is a wise law that maintains that it is only by express words that the power can be conferred upon a municipal corporation to grant exclusive rights.

But it may be said that I am supposing a case that has not arisen, but that on the contrary the company, in compliance with the contract, has been able to supply every demand of the city. My answer to this is, that the rules of law are inflexible. The validity of a contract must be determined by the same inflexible rules, whether the terms of the contract are just or unjust—are ample or inadequate for the purpose for which it was intended. Courts of equity are implicitly governed by rules of law so far as, and whenever, those rules are called into action in any case, but a court of equity gives or refuses relief according to certain equitable principles which it is not necessary here to enumerate.

Passing now to the consideration of the provisions of the charter: I think there can be no serious contention that the naked power, 'To provide the city with water' gave the city council power to grant the exclusive right to the plaintiff company to lay pipes in
443 the city for that purpose. The power, therefore, must be found, if at all, in the closing and general provision of the above paragraph, which is, that the city council shall have power generally to do whatever may be needful and necessary to be done in order to supply the city of Denver with water for fires, irrigation and other purposes, and to regulate the same.

This language was not used for the purpose of giving the city council power to act for one day, one week or one year, but was intended to give it the power at any and all times, and in the event of increased demands, to do whatever may be needful and necessary.

This paragraph contains a provision that the city council shall have power, not only to provide for, but also to regulate the manner of introducing water for irrigating and other purposes, and the general clause provides that the city council shall regulate the supply of water.

Now this contract provides that the Denver City Water Company shall have the sole and exclusive right to lay pipes for the distribution of water within the limits of the city of Denver, and that in consideration thereof said company shall lay 'each and every year, during the continuance of this agreement, in and along the streets of the city of Denver, one and one-half miles of main distributing pipes,' and that 'they shall be laid along those streets where it will afford protection from fire to the greatest number of inhabitants.'

By these provisions of the charter, the city has regulated the manner of introducing water into the city for other purposes than for irrigation; but as the only known practical way that water for do-

mestic purposes can be supplied as needed, is through pipes laid in the street, and the company, as contended, is given the exclusive right to lay pipes in the streets for the distribution of water, and is obliged to lay only one and one-half miles each year, which would be twenty-five and one-half miles during the life of the contract, it is clear to be seen, it seems to me, that the city council, by this contract, has attempted to divest itself of the power to regulate the supply of water which the necessities of and its inhabitants might demand. This the city council had no power to do.

I am not without the highest authority to support the position I have taken. The case of Wright vs. Nagle, 100 U. S. 795, arose out of an exclusive right that a certain inferior court of the state of Georgia granted to one Miller, to maintain bridges within
444 certain designated limits. The act of the legislature which clothed the said court with the power to build and keep in repair bridges, etc., provided as follows:

They are hereby authorized to contract for the building and keeping in repair of public bridges for such time, and in such was, as they may deem advisable.

Here it will be seen that the power was as ample as that given to the city council of the city of Denver.

In construing this act of the legislature, Chief Justice Waite, in delivering the opinion of the court, says:

Exclusive rights to public franchises are not favored. If granted, they will be protected, but they will never be presumed. Every statute which takes away from the legislature its power, will always be construed most strongly in favor of the state. These are elementary principals. The question here is, whether the legislature of Georgia conferred on the inferior courts of its several counties, the power of contracting away the right of the state to establish such ferries and bridges in a particular locality as the ever-changing wants of the public should in the progress of time require. In our opinion it did not. It gave these courts the right to establish ferries and bridges, but not to tie the hands of the public in respect to its further necessities. The right to establish one bridge and fix its rate of toll, does not imply a power to bind the state or its instrumentalities not to establish another in case of necessity.

The same principle is stated in the following cases:

Minturn vs. Larue, 23 How. (U. S.) 435.

Jackson Co. Horse R. Co. vs. Inter-State Rapid Transit Co., 24 Rep. 306.

Saginaw Gas Light Co. vs. City of Saginaw, 28 Fed. Rep. 530.

Grand Rapids E. L. P. Co. vs. Grand Rapids Edison E. L. & F. G. Co., 20 Am. & Eng. Corp. Cases, 270.

Gale vs. Kalamazoo, 23 Mich. 344.

State vs. Cincinnati, G. L. & C. Co., 18 Ohio St. 262.

Norwich Gas Co. vs. Norwich, 25 Conn. 19.

Gas Light Co. vs. Middleton, 69 N. Y. 231.

Illinois Canal, etc., vs. St. Louis, 2 Dillon, 70, 91, and note.

City of Brenham vs. Brenham Water Co., 4 S. W. Rep. 143.

Davenport vs. Kleinschmidt, 13 Pacific Rep. 249.

Denver & Swansea R. R. Co. vs. Denver City Ry. Co., 2 Colo. 683.

445 I am aware that the views I have expressed are at variances with some decisions that were cited at the hearing, notably the case of City of Newport vs. Newport Light Company, 64, Ky. Law, 166, and Des Moines St. R. Co. vs. Des Moines Broad Guage St. R. Co., 33 N. W. Rep. 610. But in my judgment the principle maintained in these cases is not supported by the soundest reasoning, or by the great weight of authority.

It was contended on the part of the plaintiff's counsel that if that part of the contract which gave exclusive rights to lay pipes, etc., in the streets of the city, is void, the whole contract is void. I do not so understand the law.

Jackson Co. Horse R. Co. vs. Inter-State Rapid Transit Co., 24 Fed. Rep. 306.

City of Quincy vs. Bull et al., 106 Ill. 338.

Hitchcock vs. Galveston, 96 U. S. 350, 20 Am. & Eng. Corp. cases, 270.

It is insisted further that the plaintiff company has gone to great expense in enlarging its capacity to supply water. That during sixteen years the city and its inhabitants have been supplied with water under this contract, and that to hold that the provisions of the contract giving an exclusive right to lay pipes in the city is void, would greatly diminish the value of the plaintiff's property, and that under the city's option to buy the plaintiff's works at the expiration of the contract, the city would be enabled to take advantage of the repudiation of an important provision of its contract, and thereby secure the works for a much less sum than it otherwise would, and for these several reasons the city council should not be permitted to disregard any part of its contract.

There is one answer to all this. The city council not having the power, was unable to, and did not, grant the exclusive right to the plaintiff company which it claims. The charter being the measure of the power and authority to be exercised by the city council, every person or corporation dealing with it was bound to take notice of the extent of its power.

Judge Cooley, in his work on Constitutional Limitations, upon this point says:

If in any case a party assumes to deal with a corporation on the supposition that it possesses powers which it does not, or to contract in any other manner than is permitted by the charter, he will not be allowed, even though he may have complied with the undertaking on his part, to maintain a suit against the corporation based upon its unauthorized action. Even where a party is induced to enter upon work for a corporation by false representations of cor-
446 porate officers in regard to the existence of facts on which by law, the power of the corporation to enter upon the work depends, these false representations cannot have the effect to give the power which in the particular case was granted or to validate a contract otherwise void, and therefore can afford no ground of action against the corporation, but every party contracting with it must

take notice of any want of authority which the public records would show.

(Cooley on Constitution Limitations, 235, 5th edition and note.)

Entertaining the option that the city charter did not clothe the city council of the city of Denver with power to grant the exclusive right to the plaintiff to lay water pipes in the streets of the city, it is unnecessary for me to express any views which I may entertain as to whether the territorial legislature had the power under its organic act, or other acts of congress, to confer such power upon the city council.

Holding, as I do, that the contract of May 9th, 1874, fails to give the plaintiff company the exclusive right to lay water mains and pipes in the streets of the city, and that the ordinance under which the defendant company claims a right to lay its water mains and pipes in said streets is also void, the question arises as to whether the temporary injunction should be made perpetual.

The plaintiff under its contract with the city, has the right to lay its pipes in the streets, and if the laying of the pipes by the defendant company in the streets creates obstructions and hindrances of such a nature as to cause the plaintiff company to suffer damages and loss, which is not common to the public, then the prayer should be granted.

The defendant cannot be restrained in this action simply because the plaintiff may suffer a great inconvenience or damage by reason of the defendant's conduct, than is suffered by the public generally. It must be an injury and damage personal to the plaintiff.

The streets of the city are ninety feet wide; the trenches that are dug for water pipes are from two to four feet wide, according to the size of the pipe. Now, the trenches, and the earth taken from the trenches and the temporary stringing of the pipes along the streets create an inconvenience and obstruction in the street; yet the plaintiff company suffers from it only in common with others who may, for business or pleasure, have occasion to use the streets where the work of laying pipes is being prosecuted.

447 As to Alameda avenue, the evidence is conflicting as to which company commenced the work there first, and is also conflicting as to whether the defendant company in laying its pipes under that of the plaintiff, interferes with the plaintiff's use of its pipe. The testimony of the engineers of the respective companies is in direct conflict on these questions.

In my opinion, it is the duty of the city council to regulate the manner of laying pipes by these companies, so that the rights of each will be respected, and the rights of the public are not unnecessarily interfered with.

The city council having the power to grant to the defendant company the right to lay its pipes in the streets of the city, and the plaintiff company, under the contract having already that right, each of them subject to such reasonable regulation that the city council may provide, if one company shall illegally interfere with the other, then upon proper application to the court it will be time enough to consider questions of that nature.

CHART

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FOR

FILMING

The judgment of the court will be that the injunction be dissolved and the complaint dismissed.

And there was also offered in evidence at said hearing by the said defendants, the following circular of the cross-complainant to the citizens and taxpayers of Denver, at or about the date therein mentioned.

(Here follows circular letter marked pages 448 and 449.)

450 Endorsed: 5572. U. S. Circuit Court, District of Colorado. The New York Trust Company vs. The City and County of Denver, et al. Documents Used by Respondents as Evidence in Resisting Applications for Injunction. Filed Sep. 7, 1910. Charles W. Bishop, Clerk.

Sixty-second Day, May Term.

MONDAY, *September 12th, A. D.* 1910.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the third day of May, A. D. 1910.

5572. In Chancery.

THE NEW YORK TRUST COMPANY
vs.
THE CITY AND COUNTY OF DENVER et al.

Bill for an Injunction and for Other Relief.

This cause comes on now to be heard, Henry McAllister, Junior, Esquire, appearing as solicitor for the complainant;

And thereupon, on his motion, it is ordered by the court that the complainant may file herein a supplemental bill of complaint within five (5) days from this day as it shall be advised.

451 In the Circuit Court of the United States Within and for the District of Colorado.

In Equity. No. 5572.

THE NEW YORK TRUST COMPANY, a Corporation, Complainant,
vs.
THE CITY AND COUNTY OF DENVER, a Municipal Corporation; Robert W. Speer, as Mayor of the City and County of Denver; Burt F. Davis, as Clerk of said City and County of Denver; Albion K. Vickery, as Auditor of said City and County of Denver; Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows, as Members of and Constituting the Public Utilities Commission of said City and County of Denver; Ellis Meredith, A. E. Mauff and Harry Petrie, as Members of and Constituting the Election Commission of said City and County of Denver; The Denver Union Water Company, a Corporation, and The South Platte Canal and Reservoir Company, a Corporation, Defendants.

Supplemental Bill.

To the Honorable Judges of the Circuit Court of the United States for the District of Colorado, in Equity sitting:

The New York Trust Company, a corporation of the state of New York as trustee of the express trusts set forth and alleged in
452 the original bill of complaint herein, by leave of court first had and obtained files this its supplemental bill, and in addition to all of the matters and things alleged in the original bill herein filed and as supplemental thereto, further complains and shows unto the court:

First. Heretofore and on, to wit, August 22nd, 1910, your orator exhibited its original bill of complaint in this court against all of the defendants above named, wherein and whereby upon and by reason of the facts therein set forth and alleged it prayed among other things for a writ of injunction directed to all of the defendants above named, except the defendants The Denver Union Water Company and The South Platte Canal and Reservoir Company, to restrain them and each of them and the respective successors in office of them and each of them, and the officers, agents, servants, employees and confederates of them and each of them from holding or attempting to hold on the first Tuesday in September, 1910, the election as then proposed, or from holding said election upon any date whatsoever, for the purpose of submitting the question as to the issuance of eight million dollars in bonds, or any amount in bonds whatsoever, to be sold or used for the construction and putting in operation, or either thereof, of a new system of water works for the said City and County of Denver; and from issuing or attempting to issue or signing, sealing, attesting, registering or delivering said or any bonds for that purpose; and from doing or attempting to do any act or thing whatsoever looking to or tending to accomplish or assist in the accomplishing of any of the things hereinabove set forth; or from taking any steps whatsoever looking to
453 the construction of a municipal water plant for said City and County of Denver; and in which original bill your orator further prayed for a decree declaring those provisions of section 264A of the Charter of the City and County of Denver set forth and referred to in said bill, contemplating and providing for the construction and operation of a municipal water plant and the authorization and issuance of bonds for that purpose, to be wholly and entirely void and of no effect, for the reasons set forth in said bill. And your orator then and there likewise filed herein its motion or application for a temporary injunction as prayed for in said original bill. Thereafter and on, to wit, the 6th day of September, 1910, after full hearing upon said motion or application for an injunction, this court granted the same in all particulars except in so far as a temporary injunction was sought restraining or prohibiting the holding of said election and the ascertainment and declaration of the result thereof; and an order of injunction to that effect was duly made and entered of record herein.

Second. Your orator avers that subsequent to the entry of said order of injunction and on the 6th day of September, 1910, being the first Tuesday in September, 1910, the election hereinabove referred to and mentioned in said original bill was held. At said election, as appears from the official returns thereof, the total number of votes cast upon the question of the issuance of said bonds which was submitted thereat as alleged in the original bill herein, was 9,366, a majority of which votes as likewise appears from said official returns was in favor of said bond issue. Your orator avers that had this honorable court not entered said order of injunction upon
454 said original bill and also the order of injunction granted upon the cross-bill of The Denver Union Water Company filed herein, and which orders are now in effect, said bonds, aggre-

gating the total sum of eight million dollars, or a large portion thereof, would be forthwith signed, countersigned, registered, issued, negotiated and sold, and the same or the proceeds thereof expended in the attempt to construct a new, independent and complete system of water works for supplying the City and County of Denver and the inhabitants thereof with water, as more fully shown in the original bill. Your orator further avers that for the reasons fully set forth at length in such original bill, which is hereby referred to, said election and the issue of said bonds and each of them and each and every matter and thing whatsoever hereafter to be done or proposed to be done under or by authority or in pursuance of said election, is and will be wholly invalid and will inflict upon your orator and the defendant and cross-complainant, The Denver Union Water Company, and its and their property and business an injury which will be wholly irreparable and against which your orator has no plain, speedy or adequate or any remedy whatsoever at law.

Wherefore, and forasmuch as your orator is remediless in the premises at and by the strict rules of the common law and can have relief only in a court of equity where matters of this nature are property cognizable and reviewable, it files this its supplemental bill of complaint and prays the premises considered:

1. That this supplemental bill may be read and considered in connection with and as supplementary to the original bill
455 herein filed, and that the defendants to said original bill who are likewise made defendants to this supplemental bill be required in accordance with the rules and practice of this court to answer unto this supplemental bill as well as unto the original bill (but not under oath, all answers under oath being hereby expressly waived).

2. May it please your Honors to grant unto your orator a writ of injunction issued out of and in accordance with the rules and practice of this honorable court, to be directed to all of the defendants herein except Ellis Meredith, A. E. Mauff and Harry Petrie as members of and constituting the election commission of said City and County of Denver, The Denver Union Water Company and The South Platte Canal and Reservoir Company, to restrain them and each of them and their respective successors in office and each of them and the officers, agents, servants, employees, representatives and confederates of them and each of them, from issuing or attempting to issue or signing, sealing, attesting, registering or delivering said bonds or any of them, voted at said special election held on the first Tuesday in September, 1910, for any purpose whatsoever; and from doing or attempting to do any act or thing whatsoever looking to the accomplishing or assist in the accomplishing of any of the things hereinabove sought to be enjoined, or from taking any steps whatsoever looking to the construction of a municipal water plant for said City and County of Denver; and that upon final hearing such injunction be made perpetual.

3. That in addition to all of the matters and things em-
456 braced in the prayers for special and general relief in said original bill a decree be entered herein holding, declaring

and adjudging said election held on the first Tuesday in September, 1910, and the vote taken thereat and all action taken or hereafter to be taken or threatened to be taken under, by virtue or by authority of said election to be wholly illegal, void and of no force or effect whatsoever and the same be set aside, canceled and for naught held.

4. That your orator may have all of the relief, both special and general, prayed for in its original bill.

5. That your orator may have such other, further and different relief as the equity of the case may require and as to your Honors may seem fit, and that it be decreed its cost in this behalf expended.

THE NEW YORK TRUST COMPANY,
By JOEL F. VAILE,
HENRY McALLISTER, JR.,
WILLIAM N. VAILE,
Its Solicitors.

UNDERWOOD, VAN VORST & HOYT,
J. MARKHAM MARSHALL,
VAILE, McALLISTER & VAILE.
Of Counsel.

UNITED STATES OF AMERICA,
State of Colorado, City and County of Denver, ss:

Henry McAllister, Jr., being first duly sworn, on his oath deposes and says that he is one of the Solicitors for the above-named complainant, The New York Trust Company, which is a corporation organized and existing under the laws of the State of New
457 York; that he has read the foregoing supplemental bill and knows the contents thereof, and that the same is true to the best knowledge and belief of affiant.

HENRY McALLISTER, JR.

Subscribed and sworn to before me, this 12th day of September, 1910.

My commission expires July 30, 1912.

[SEAL.]

OLIVER DEAN,
Notary Public.

458 No. 5572. U. S. Circuit Court of Colorado. The New York Trust Company, Complainant, vs. The City and County of Denver, et al., Defendants. Supplemental Bill. Filed Sep. 12, 1910. Charles W. Bishop, Clerk. Vaile, McAllister and Vaile, Counselors at Law, Equitable Bldg., Denver, Colo.

459 In the Circuit Court of the United States for the District of Colorado.

No. 5572. In Equity.

THE NEW YORK TRUST COMPANY, a Corporation, Complainant,
vs.
THE CITY AND COUNTY OF DENVER, a Municipal Corporation, et al., Defendants.

Each of the undersigned hereby acknowledges receipt of a copy of the supplemental cross-bill of The Denver Union Water Company and consent that the same may now be filed with the same effect as though an order granting leave to file the same had previously been made and entered of record; but no objections to the sufficiency thereof, or any part of the same, are hereby waived or prejudiced.

UNDERWOOD, VAN VORST & HOYT,
VAILE, McALLISTER & VAILE,
Solicitors for The New York Trust Company.

H. A. LINDSLEY,
GEO. Q. RICHMOND, P.,
Solicitors for The City and County of Denver, Robert W. Speer, as Mayor Thereof; Burt F. Davis, as Clerk Thereof; Albion K. Vickery, as Auditor Thereof; Ellis Meredith, A. E. Mauff, and Harry Petrie, as Members of and Constituting the Election Commission Thereof.

THOMAS, BRYANT, NYE & MALBURN,
C. W. WATERMAN,
Solicitors for Armour C. Anderson, Edwin Van Cise, and A. Lincoln Fellows, Claiming to be and Acting as Members of and Constituting the Public Utilities Commission of said City and County.

GERALD HUGHES,
Solicitor for The South Platte Canal and Reservoir Company.

Endorsed: In Equity. No. 5572. In the Circuit Court of the U. S. Dist. of Colorado. The New York Trust Company, Complainant vs. The City and County of Denver, et al., Defendants. Acknowledgment of Receipt of Copy of Supplemental Cross-Bill of the Denver Union Water Company and Consent to Filing of same. Filed Sep. 16, 1910. Charles W. Bishop, Clerk. Gerald Hughes, Dorsey & Hodges, Attorneys for defendant The Denver Union Water Company.

460 In the Circuit Court of the United States within and for the District of Colorado.

No. 5572. In Equity.

THE NEW YORK TRUST COMPANY, a Corporation, Complainant,

vs.

THE CITY AND COUNTY OF DENVER, a Municipal Corporation; Robert W. Speer, as Mayor of the City and County of Denver; Burt F. Davis, as Clerk of said City and County of Denver; Albion K. Vickery, as Auditor of said City and County of Denver; Armour C. Anderson, Edwin Van Cise, and A. Lincoln Fellows, as Members of and Constituting the Public Utilities Commission of said City and County of Denver; Ellis Meredith, A. E. Mauff, and Harry Petrie, as Members of and Constituting the Election Commission of said City and County of Denver; The Denver Union Water Company, a Corporation, and The South Platte Canal and Reservoir Company, a Corporation, Defendants.

Supplemental Cross-Bill of The Denver Union Water Company.

To the Honorable the Judges of the Circuit Court of the United States for the District of Colorado:

Comes now the defendant and cross-complainant, The Denver Union Water Company, a corporation duly organized and existing under and by virtue of the laws of the state of Colorado, and by leave of court first had and obtained files herein its supplemental cross-bill, and in addition to all of the matters and things heretofore alleged in its original cross-bill herein filed and supplemental thereto, further complaining, shows unto the court:

First. That heretofore, and on, to-wit, August 25, A. D. 1910, this defendant filed herein its cross-bill against the complainant, The New York Trust Company, and also against all of the other defendants except The South Platte Canal and Reservoir Company, wherein and whereby, upon the facts therein set forth and alleged, it prayed, among other things, for a writ of injunction, directed to the defendants hereinabove named other than The South Platte Canal and Reservoir Company, to restrain them, and each of them, and their respective successors in office, and each of them, and all officers, agents, servants, employés, representatives and confederates of them, or any of them, from holding or attempting to hold on the first Tuesday in September, A. D. 1910, the election as then proposed and set forth in section 264-A of the charter and ordinance No. 98 of the series of 1910, or at any other date whatsoever, for the purpose of submitting the question of the issuance of said eight million dollars ($8,000,000.00) in bonds, or any amount whatsoever, as in said section 264-A and Ordinance No. 98 aforesaid set forth; and from issuing or attempting to issue said bonds, or any of
461 them, for any purpose whatsoever; and from interfering or attempting to interfere with or obstruct this defendant in

the exercise and enjoyment of its contract and franchise rights under said Ordinance No. 44 of the series of 1890, and otherwise; and from doing or attempting to do any act or thing tending to accomplish any of such purposes. And this defendant and cross-complainant then and there likewise filed herein its motion or application for a temporary injunction, as prayed in said cross-bill; that thereafter and on, to-wit, the 6th day of September, A. D. 1910, after full hearing upon said motion or application for an injunction, this court granted said motion or application in all particulars except in so far as a temporary injunction was sought prohibiting the holding of said election and the ascertainment and declaration of the result thereof; and an order to that effect was duly made and entered of record herein; that thereupon pursuant to said order, said writ of injunction was issued and duly served upon the defendants to whom it was directed.

Second. This defendant further alleges that subsequent to all of the matters and things hereinabove stated, and on said 6th day of September, A. D. 1910, being the first Tuesday in said month of September, said election hereinabove and in said original cross-bill mentioned was held; that at said election, as appears from the official returns thereof, the total number of votes cast upon the question of the issuance of said bonds, which was submitted thereat as hereinbefore in the original cross-bill alleged, was nine thousand, three hundred and sixty-six (9,366), a majority of which votes, as likewise appears from said official returns, were cast in favor of said bond issue. And your defendant and cross-complainant avers that but for the temporary injunction heretofore issued herein by this honorable court, and now in effect, said bonds would be forthwith signed, countersigned, registered, issued and negotiated, and the same or the proceeds thereof expended in the attempt to construct a new, independent and complete system of water works for supplying the city and county of Denver and the inhabitants thereof with water; and your defendant and cross-complainant avers, as it has hereinbefore in its original cross-bill alleged, that said election, and each and every matter and thing whatsoever hereafter to be done or proposed to be done under or by authority or in pursuance of said election, is and will be wholly invalid, and will inflict upon your defendant and cross-complainant and its property and business an injury which will be wholly irreparable, and against which it has no plain, speedy and adequate or any remedy whatsoever at law, all as more fully and at length set forth and
462 alleged in its original cross bill herein filed, to which reference is hereby made.

Wherefore, and inasmuch as your defendant and cross-complainant is without remedy at and by the strict rules of the common law, and can have relief only in a court of equity, where matters of this nature are properly cognizable and reviewable, it files this its supplemental cross-bill and prays the premises considered:

1. That this supplemental cross-bill may be read and considered in connection with and in addition to and supplementary of its original cross-bill herein filed; and that the defendants to said orig-

inal cross-bill, who are likewise made defendants to this supplemental cross-bill be required, in accordance with the rules and practice of this court, to answer unto this supplemental cross-bill as well as unto said original cross-bill hereinbefore filed (but not under oath, all answers under oath being hereby expressly waived).

2. That your honors do grant your defendant and cross-complainant a writ of injunction issued out of and in accordance with the rules and practice of this honorable court, to be directed to the defendants herein named except The South Platte Canal and Reservoir Company, to restrain them, and each of them, and their respective successors in office, and each of them, and all officers, agents, servants, employés, representatives and confederates of them, or any of them, from issuing or attempting to issue said bonds, or any of them, voted at said election held on the first Tuesday in September, A. D. 1910, for any purpose whatsoever; and from interfering or attempting to interfere with or obstruct this defendant and cross-complainant in the exercise and enjoyment of its contract and franchise rights under said ordinance No. 44 of the series of 1890, and otherwise; and from doing or attempting to do any act or thing tending to accomplish any of such purposes, and that upon final hearing such injunction be made perpetual.

3. That in addition to all of the matters and things embraced in the general and special prayer in said original cross-bill herein, a decree be entered herein holding, declaring and adjudging said election held on the first Tuesday in September, A. D. 1910, and all action taken thereat and thereunder, and any and all action hereafter to be taken or threatened to be taken under, by virtue or by authority of said election to be wholly illegal, void and of no force or effect whatsoever, and that the same be canceled, set aside and for naught held.

463 4. That this defendant and cross-complainant may have all of the relief, both general and special, prayed for in its original cross-bill herein filed.

5. That defendant and cross-complainant may have such other, further and different relief as the equity of the case may require, and as to your honors may seem fit, and that it be decreed its cost in this behalf laid out and expended.

THE DENVER UNION WATER COMPANY,
By GERALD HUGHES, *Its Solicitor.*

C. C. DORSEY,
W. V. HODGES,
A. N. STEVENSON,
Of Counsel.

UNITED STATES OF AMERICA,
District and State of Colorado,
City and County of Denver, ss:

Walter P. Miller, being first duly sworn, on his oath deposes and says: That he is the secretary of the defendant The Denver Union Water Company, that said defendant is a corporation and for that reason he makes this verification in its behalf; that he has read the foregoing cross-bill and knows the contents thereof, and

that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those he believes it to be true. WALTER P. MILLER.

Subscribed and sworn to before me this 16th day of September, A. D. 1910.

My commission expires October 15th, 1913.

[NOTARIAL SEAL.] JAMES T. NAFF,
Notary Public.

Endorsed: 5572. In the circuit court of the United States within and for the district of Colorado. In Equity. No. 5572. The New York Trust Company, a corporation, complainant, vs. The City and County of Denver, a municipal corporation; Robert W. Speer, as mayor of the City and County of Denver, Burt F. Davis, as clerk of said City and County of Denver, Albion K. Vickery, as auditor of said City and County of Denver, Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows, as members of and constituting the Public Utilities Commission of said City and County of Denver, Ellis Meredith, A. E. Mauff and Harry Petrie, as members of and constituting the Election Commission of said City and County of Denver, The Denver Union Water Company, a corporation, 464 and The South Platte Canal and Reservoir Company, a corporation, defendants. Supplemental Cross-Bill of the Denver Union Water Company. Clayton C. Dorsey, William V. Hodges, A. M. Stevenson, Of Counsel. Gerald Hughes, Solicitor for The Denver Union Water Company. Filed Sep. 16, 1910. Charles W. Bishop, Clerk.

In the Circuit Court of the United States within and for the District of Colorado.

No. 5572. In Equity.

THE NEW YORK TRUST COMPANY, a Corporation, Complainant,
vs.
THE CITY AND COUNTY OF DENVER, a Municipal Corporation; Robert W. Speer, as Mayor of the City and County of Denver; Burt F. Davis, as Clerk of said City and County of Denver; Albion K. Vickery, as Auditor of said City and County of Denver; Armour C. Anderson, Edwin Van Cise, and A. Lincoln Fellows, as Members of and Constituting the Public Utilities Commission of said City and County of Denver; Ellis Meredith, A. E. Mauff, and Harry Petrie, as Members of and Constituting the Election Commission of said City and County of Denver; The Denver Union Water Company, a Corporation, and The South Platte Canal and Reservoir Company, a Corporation, Defendants.

Notice.

To the above named Complainant, The New York Trust Company, a Corporation:

You Will Please Take Notice, That the undersigned defendants

in the above entitled cause will, on Tuesday, the 20th day of September, A. D. 1910, at ten o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, apply to the said Court for an order allowing the undersigned defendants an appeal to the United States Circuit Court of Appeals for the Eighth Judicial Circuit, from that certain order and decree of injunction made and entered in the above entitled cause upon the bill of complaint, on the 6th day of September, A. D. 1910; when and where you may be present if you so desire.

THE CITY AND COUNTY OF DENVER,
A Municipal Corporation;
ROBERT W. SPEER,
As Mayor of the City and County of Denver;
BURT F. DAVIS,
As Clerk of said City and County of Denver;
465 ALBION K. VICKERY,
As Auditor of said City and County of Denver;
ELLIS MEREDITH,
A. E. MAUFF, AND
HARRY PETRIE,
As Members of and Constituting the Election Commission of said City and County of Denver,
By H. A. LINDSLEY,
G. Q. RICHMOND, *their Solicitors;*
ARMOUR C. ANDERSON,
EDWIN VAN CISE, AND
A. LINCOLN FELLOWS,
As Members of and Constituting the Public Utilities Commission of said City and County of Denver,
By CHARLES S. THOMAS,
CHARLES W. WATERMAN, *their Solicitors.*

The receipt and service of the above and foregoing Notice is hereby confessed and acknowledged, at Denver, Colorado, this 14th day of September, A. D. 1910.

JOEL F. VAILE,
HENRY McALLISTER, JR.,
WILLIAM N. VAILE,
Solicitors for the Complainant, The New York Trust Company.

Endorsed: No. 5572. U. S. Circuit Court of Colorado. The New York Trust Company, Complainant, vs. The City and County of Denver, and others, Defendants. Notice of Application for Order Allowing Appeal on Bill. Filed Sep. 21, 1910. Charles W. Bishop, Clerk. Charles W. Waterman, Counselor at law, Denver, Colorado.

In the Circuit Court of the United States within and for the District of Colorado.

No. 5572. In Equity.

THE NEW YORK TRUST COMPANY, a Corporation, Complainant,

vs.

THE CITY AND COUNTY OF DENVER, a Municipal Corporation; Robert W. Speer, as Mayor of the City and County of Denver; Burt F. Davis, as Clerk of said City and County of Denver; Albion K. Vickery, as Auditor of said City and County of Denver; Armour C. Anderson, Edwin Van Cise, and A. Lincoln Fellows, as Members of and Constituting the Public Utilities Commission of said City and County of Denver; Ellis Meredith, A. E. Mauff, and Harry Petrie, as Members of and Constituting the Election Commission of said City and County of Denver; The Denver Union Water Company, a Corporation; and The South Platte Canal and Reservoir Company, a Corporation, Defendants.

466 *Notice.*

To The Denver Union Water Company, a Corporation, and to The South Platte Canal and Reservoir Company, a Corporation, two of the Defendants above named:

You, And Each Of You, are hereby invited to join with the undersigned defendants, on or before Tuesday, the 20th day of September, A. D. 1910, to prosecute an appeal in the above entitled cause to the United States Circuit Court of Appeals for the Eighth Judicial Circuit, from that certain order and decree of injunction made and entered in the above entitled cause upon the bill of complaint, on the 6th day of September, A. D. 1910, upon the motion and application of the above named complainant, and to appear in open court on the said 20th day of September, A. D. 1910, at ten o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, and either join in said appeal or decline to join therein, or you and each of you will be deemed to have acquiesced in the said order and decree of injunction, and the undersigned defendants will prosecute said appeal without joining you as parties.

THE CITY AND COUNTY OF DENVER,
A Municipal Corporation:
ROBERT W. SPEER,
As Mayor of the City and County of Denver:
BURT F. DAVIS,
As Clerk of said City and County of Denver:
ALBION K. VICKERY,
As Auditor of said City and County of Denver:
ELLIS MEREDITH,
A. E. MAUFF, AND
HARRY PETRIE,
As Members of and Constituting the Election Commission of said City and County of Denver,

By H. A. LINDSLEY,
G. Q. RICHMOND, *their Solicitors;*
ARMOUR C. ANDERSON,
EDWIN VAN CISE, AND
A. LINCOLN FELLOWS,
As Members of and Constituting the Public Utilities Commission of said City and County of Denver,
By CHARLES S. THOMAS,
CHARLES W. WATERMAN, *their Solicitors.*

467 The receipt and service of the above and foregoing Notice is hereby confessed and acknowledged, at Denver, Colorado, this 15th day of September, A. D. 1910.

GERALD HUGHES,
C. C. DORSEY,
W. V. HODGES,
A. M. STEVENSON,
Solicitors for the Defendants, The Denver Union Water Company and The South Platte Canal and Reservoir Company.

Endorsed: No. 5572. U. S. Circuit Court of Colorado. The New York Trust Company, Complainant, vs. The City and County of Denver, and others, Defendants. Notice of Severance on Bill. Filed Sep. 21, 1910. Charles W. Bishop, Clerk. Charles W. Waterman, Counselor at Law, Denver, Colorado.

In the Circuit Court of the United States within and for the District of Colorado.

No. 5572. In Equity.

THE NEW YORK TRUST COMPANY, a Corporation, Complainant,
vs.
THE CITY AND COUNTY OF DENVER, a Municipal Corporation; Robert W. Speer, as Mayor of the City and County of Denver; Burt F. Davis, as Clerk of said City and County of Denver; Albion K. Vickery, as Auditor of said City and County of Denver; Armour C. Anderson, Edwin Van Cise, and A. Lincoln Fellows, as Members of and Constituting the Public Utilities Commission of said City and County of Denver; Ellis Meredith, A. E. Mauff, and Harry Petrie, as Members of and Constituting the Election Commission of said City and County of Denver; The Denver Union Water Company, a Corporation; and The South Platte Canal and Reservoir Company, a Corporation, Defendants.

Prayer for Appeal.

The defendants, The City and County of Denver, a Municipal Corporation, Robert W. Speer, as Mayor of the City and County of Denver; Burt F. Davis, as Clerk of said City and County of Denver;

Albion K. Vickery, as Auditor of said City and County of Denver; Ellis Meredith, A. E. Mauff and Harry Petrie, as Members of and Constituting the Election Commission of said City and County of Denver; Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows, as Members of and Constituting the Public Utilities Commission of said City and County of Denver, conceiving themselves aggrieved by that certain order and decree of injunction
468 made and entered on the 6th day of September, A. D. 1910, upon the bill of complaint in the above entitled cause, and upon the motion and application of the complainant, The New York Trust Company, do hereby appeal from the said order and decree to the United States Circuit Court of Appeals for the Eighth Judicial Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and they and each of them pray that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order and decree was made and entered, duly authenticated, may be sent forthwith to the said United States Circuit Court of Appeals for the Eighth Judicial Circuit.

They further represent and say that the defendants, The Denver Union Water Company and The South Platte Canal and Reservoir Company, have been duly cited and notified, requested and invited, to join in this appeal, and that the said The Denver Union Water Company and said The South Platte Canal and Reservoir Company have, and each of them has, refused to join in this appeal, as shown by the notice and proof of service thereto attached, filed herewith.

THE CITY AND COUNTY OF DENVER,
A Municipal Corporation;
ROBERT W. SPEER,
As Mayor of the City and County of Denver;
BURT F. DAVIS,
As Clerk of said City and County of Denver;
ALBION K. VICKERY,
As Auditor of said City and County of Denver;
ELLIS MEREDITH,
A. E. MAUFF, AND
HARRY PETRIE,
As Members of and Constituting the Election Commission of said City and County of Denver,
By H. A. LINDSLEY,
G. Q. RICHMOND, *their Solicitors;*
ARMOUR C. ANDERSON,
EDWIN VAN CISE, AND
A. LINCOLN FELLOWS,
As Members of and Constituting the Public Utilities Commission of said City and County of Denver,
By CHARLES S. THOMAS,
CHARLES W. WATERMAN, *their Solicitors.*

Endorsed: No. 5572. U. S. Circuit Court, of Colorado. The New York Trust Company, complainant, vs. The City and County

of Denver and others, Defendants. Prayer for Appeal on Bill. Filed Sept. 21, 1910. Charles W. Bishop, Clerk. Charles
469 W. Waterman, Counselor at Law, Denver, Colorado.

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the Circuit Court of the United States in and for said District.

No. 5572. In Chancery.

THE NEW YORK TRUST COMPANY, Complainant,
vs.
THE CITY AND COUNTY OF DENVER; ROBERT W. SPEER, as Mayor of the City and County of Denver; Burt F. Davis, as Clerk of said City and County of Denver; Albion K. Vickery, as Auditor of said City and County of Denver; Armour C. Anderson, Edwin Van Cise, and A. Lincoln Fellows, as Members of and Constituting the Public Utilities Commission of said City and County of Denver; Ellis Meredith, A. E. Mauff, and Harry Petrie, as Members of and Constituting the Election Commission of said City and County of Denver; The Denver Union Water Company, and The South Platte Canal and Reservoir Company, Defendants.

Come now the appealing defendants, The City and County of Denver, Robert W. Speer as Mayor thereof, Burt F. Davis as clerk thereof, Albion K. Vickery as Auditor thereof, Armour C. Anderson, Edwin Van Cise, and A. Lincoln Fellows as members of and constituting the Public Utilities Commission of said City and County of Denver, Ellis Meredith, A. E. Mauff, and Harry Petrie as members of and constituting the Election Commission thereof, who are about to apply for an order granting them an appeal from the interlocutory judgment and order for injunction made by this Honorable court on the sixth day of September, A. D. 1910, in said cause, and file this their assignment of errors, upon which they and each of them will [reply] upon their appeal therefrom.

The said circuit court erred in making the said interlocutory judgment and order granting an injunction in this cause, for the following reasons and each of them.

(First.) The said court had no jurisdiction of the said cause.

(Second.) The said court did not arrange the parties herein according to their respective interests, which if done would have destroyed the necessary diversity of citizenship of the parties and defeated its jurisdiction based on such diversity.

470 (Third.) No federal question, or question arising under the Constitution of the United States nor any amendment thereof or laws or treaties made thereunder, was presented by or arose from the averments of the complainant's bill or the exhibits made a part thereof, and the court erred in holding otherwise.

(Fourth.) There was and is no equity in complainant's bill, and

no right to relief against any defendant therein named, either interlocutory or final.

(Fifth.) There was and is no impairment of the obligation of any contract or agreement set forth in the bill and exhibits, by reason of any act or thing done or threatened to be done as charged therein against these appealing defendants or either or any of them, and the court erred in holding otherwise.

(Sixth.) The action was brought and the bill framed collusively by the complainant and the defendants The Denver Union Water Company and The South Platte Canal and Reservoir Company, as shown by the record herein, for the purpose among other things of conferring jurisdiction upon said circuit court which does not exist in law, and the court erred in not dismissing the bill for that reason upon the hearing for an injunction.

(Seventh.) The court erred in granting the preliminary writ of injunction as prayed for by the complainant.

(Eighth.) Neither Ordinance No. 44, Series of 1890, nor 163, Series of 1907, in any manner prevents the appellant city and county from constructing a water system of its own, and the circuit court erred in holding otherwise.

(Ninth.) Section 264*a* of the City and County Charter does not in its terms, nor will the execution of such terms or any part thereof, impair the obligation of any contract between the city of Denver and The Denver Union Water Company or its predecessors, and the circuit court erred in holding otherwise.

(Tenth.) The circuit court erred in the reasons and each of them assigned by it for its order granting such preliminary writ of injunction.

(Eleventh.) No act done or threatened to be done by the appealing defendants or any of them as charged in the bill confers any right of action or demand for relief upon the complainant company. Any right of action or demand for relief arising from such act or threatened act or acts inures to the defendant The Denver Union Water Company and to it alone, if to anyone.

471 (Twelfth.) The circuit court erred in granting any injunction whatever against the appealing defendants or any of them in favor of complainant.

(Thirteenth.) The circuit court erred in other matters and things apparent upon the face of the record.

Wherefore The appealing defendants pray that the said judgment and interlocutory order be in all things set aside, annulled, reversed, and for naught held, and that said appealing defendants recover their costs to be taxed.

HARRY A. LINDSLEY,
GEO. Q. RICHMOND,
Sol'rs for City & County of Denver, R. W. Speer, as Mayor, et al.
CHAS. W. WATERMAN,
CHAS. S. THOMAS,
Solicitors for Public Utilities Commission & Election Commission, and the Individual Members Thereof.

Endorsed: No. 5572. United States of America, district of Colorado, in the circuit court. The New York Trust Company, Complainant, vs. The City and County of Denver, et al., defendants. Assignment of Errors on Bill. Filed Sep. 21, 1910. Charles W. Bishop, Clerk.

Sixty-third Day, May Term.

WEDNESDAY, *September* 21*st*, A. D. 1910.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the third day of May, A. D. 1910.

5572. In Chancery.

THE NEW YORK TRUST COMPANY
vs.
THE CITY AND COUNTY OF DENVER; ROBERT W. SPEER, as Mayor of the City and County of Denver; Burt F. Davis, as Clerk of said City and County of Denver; Albion K. Vickery, as Auditor of said City and County of Denver; Armour C. Anderson, Edwin Van Cise, and A. Lincoln Fellows, as Members of and Constituting the Public Utilities Commission of said City and County of Denver; Ellis Meredith, A. E. Mauff, and Harry Petrie, as Members of and Constituting the Election Commission of said City and County of Denver; The Denver Union Water Company, and The South Platte Canal and Reservoir Company.

472 Bill for Injunction and for Other Relief.

Now on this 21st day of September, A. D. 1910, the same being one of the regular juridical days of the May, A. D. 1910, term of said court, came the defendants, The City and County of Denver, a municipal corporation, Robert W. Speer, as Mayor of the City and County of Denver, Burt F. Davis, as clerk of said City and County of Denver; Albion K. Vickery, as Auditor of said City and County of Denver; Armour C. Anderson, Edwin Van Cise, and A. Lincoln Fellows, as members of and constituting the Public Utilities Commission of said City and County of Denver; Ellis Meredith, A. E. Mauff, and Harry Petrie, as members of and constituting the Election Commission of said City and County of Denver, and present their petition in writing for an appeal from that certain order and decree of injunction granted upon the bill of complaint in said cause on the 6th day of September, A. D. 1910, to the United States circuit court of appeals for the eighth judicial circuit, together with an assignment of errors accompanying the same; which petition, upon consideration of the court is hereby granted and allowed, and the court hereby allows an appeal from said order and decree to the said United States circuit court of appeals for the eighth judicial circuit, upon the filing of a bond in the penal sum of five hundred dollars ($500) with good and sufficient security to be approved by the court.

And it further appearing that the defendants, to-wit, The Denver Union Water Company and The South Platte Canal and Reservoir Company, have and each of them has, been duly notified in writing to appear in open court on this, the 20th day of September, A. D. 1910, and either join in said appeal, or decline to join therein; and it further appearing that the said The Denver Union Water Company and said The South Platte Canal and Reservoir Company have, and each of them has, refused to join in said appeal, and have severed themselves in their defense in this court, the said The City and County of Denver, a municipal corporation; Robert W. Speer, as Mayor of the City and County of Denver, Burt F. Davis, as Clerk of said City and County of Denver, Albion K. Vickery, as Auditor of said City and County of Denver; Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows, as members of and constituting the Public Utilities Commission of said City and County of Denver, Ellis Meredith, A. E. Mauff, and Harry Petrie, as members of and constituting the Election Commission of said City and County of Denver, are hereby granted their appeal as aforesaid, and their interests are severed in said appeal from the said The Denver
473 Union Water Company and said The South Platte Canal and Reservoir Company.

UNITED STATES OF AMERICA,
District of Colorado, ss:

Know all Men by these Presents That we, The City and County of Denver, a municipal corporation, Robert W. Speer as mayor of the City and County of Denver, Burt F. Davis, as clerk of said City and County of Denver, Albion K. Vickery as auditor of said City and County of Denver, Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows as members of and constituting the Public Utilities Commission of said City and County of Denver, Ellis Meredith, A. E. Mauff and Harry Petrie, as members of and constituting the Election Commission of said City and County of Denver, as principals, and National Surety Company as surety, are held and firmly bound unto the New York Trust Company in the full and just sum of five hundred dollars to be paid to the said New York Trust Company or its assigns, for which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals, and dated this 13th day of September in the year of our Lord one thousand nine hundred and ten.

Whereas, lately at the May Term, A. D. 1910, of the circuit court of the United States for the district of Colorado, sitting at Denver, in a suit pending in said court between the New York Trust Company, complainant, and the above named principal obligors impleaded with The Denver Union Water Company and The South Platte Canal and Reservoir Company, an order and interlocutory decree was entered against the said above named principal obligors restraining and enjoining them and each of them until the further order of said court from issuing or attempting to issue or signing, sealing, attesting, registering, or delivering any bonds either in the

amount of eight million dollars or in any amount whatsoever, under or in pursuance of or under color of authority of a certain election held or to be held on the first Tuesday in September, A. D. 1910, in said City and County of Denver, or under or by virtue or under color of authority of section 264*a* of the charter of said City and County of Denver, and from doing or attempting to do any act or thing relating thereto; and the said above named principal obligors having prayed and been allowed an appeal to the United States Circuit Court of Appeals for the eighth circuit, to reverse the said order and decree in the aforesaid suit, and a citation directed to the said New York Trust Company citing and admonishing it to
474 be and appear in the United States circuit court of appeals for the eighth circuit at the city of St. Louis, Missouri, sixty days from and after the date of said citation;

Now the condition of the above obligation is such that if the said above named parties as principal obligors herein shall prosecute said appeal to effect, and answer all damages and costs if they fail to make good said plea, then the above obligation to be void, otherwise to remain in full force and virtue.

THE CITY AND COUNTY OF DENVER,
By R. W. SPEER, *Mayor.*

[Seal City and County of Denver.]

Attest:
BURT F. DAVIS,
Clerk of the City and County of Denver.
By J. A. DOWSON,
Deputy Clerk.

[Seal City and County of Denver.]

ROBERT W. SPEER, *as Mayor,* [L. S.]
BURT F. DAVIS, *as Clerk,* [L. S.]
ALBION K. VICKERY, *as Auditor,* [L. S.]
ARMOUR C. ANDERSON, [L. S.]
EDWIN VAN CISE, [L. S.]
A. LINCOLN FELLOWS, [L. S.]
Constituting the Public Utilities Commission.

ELLIS MEREDITH, [L. S.]
ALBERT E. MAUFF, [L. S.]
HARRY PETRIE, [L. S.]
Constituting the Election Commission.

[Corporate Seal National Surety Company.]

NATIONAL SURETY COMPANY,
By RALPH W. SMITH,
Attorney in Fact.

Signed, Sealed, and delivered in presence of

——— ———.

Approved:
ROBT E. LEWIS, *Judge.*

Endorsed: 5572. United States of America, district of Colorado, in the circuit court. The New York Trust Company, a corporation, complainant, vs. The City and County of Denver, a municipal corporation, et al., defendants. Appeal Bond $500.00 of Defendants to Complainant. Filed Sep. 21, 1910. Charles W. Bishop, Clerk.

In the Circuit Court of the United States within and for the District of Colorado.

475 No. 5572. In Equity.

Original Bill.

THE NEW YORK TRUST COMPANY, a Corporation, Complainant,

vs.

THE CITY AND COUNTY OF DENVER, a Municipal Corporation; Robert W. Speer, as Mayor of the City and County of Denver; Burt F. Davis, as Clerk of said City and County of Denver; Albion K. Vickery, as Auditor of said City and County of Denver; Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows, as Members of and Constituting the Public Utilities Commission of said City and County of Denver; Ellis Meredith, A. E. Mauff and Harry Petrie, as Members of and Constituting the Election Commission of said City and County of Denver; The Denver Union Water Company, a Corporation; and The South Platte Canal and Reservoir Company, a Corporation, Defendants.

Cross-Bill.

THE DENVER UNION WATER COMPANY, a Corporation, Cross-Complainant,

vs.

THE CITY AND COUNTY OF DENVER; ROBERT W. SPEER, as Mayor of the City and County of Denver; Burt F. Davis, as Clerk of said City and County of Denver; Albion K. Vickery, as Auditor of said City and County of Denver; Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows, Claiming to be and Assuming to act as Members of and Constituting the Public Utilities Commission of said City and County of Denver; Ellis Meredith, A. E. Mauff and Harry Petrie, as Members of and Constituting the Election Commission of said City and County of Denver; and The New York Trust Company, Defendants to the Cross-Bill.

Notice.

To the Denver Union Water Company, a Corporation, Cross-Complainant in the Above Cross-Bill:

You will Please Take Notice, That the undersigned defendants to the above entitled cross-bill will, on Tuesday, the 20th day of September, A. D. 1910, at ten o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, apply to the said Court

for an order allowing the undersigned defendants to said cross-bill an appeal to the United States Circuit Court of Appeals for the Eighth Judicial Circuit, from that certain order and decree of injunction made and entered on said cross-bill upon the application of the cross-complainant, The Denver Union Water Com-
476 pany, on the 6th day of September, A. D. 1910; when and where you may be present if you so desire.

THE CITY AND COUNTY OF DENVER,
A Municipal Corporation;
ROBERT W. SPEER,
As Mayor of the City and County of Denver;
BURT F. DAVIS,
As Clerk of Said City and County of Denver;
ALBION K. VICKERY,
As Auditor of Said City and County of Denver;
ELLIS MEREDITH,
A. E. MAUFF, AND
HARRY PETRIE,
As Members of and Constituting the Election Commission of Said City and County of Denver.

By H. A. LINDSLEY AND
E. Q. RICHMOND,
Their Solicitors.

ARMOUR C. ANDERSON,
EDWIN VAN CISE AND
A. LINCOLN FELLOWS,
As Members of and Constituting the Public Utilities Commission of Said City and County of Denver.

By CHARLES S. THOMAS,
CHARLES W. WATERMAN,
Their Solicitors.

The receipt of a copy, and service of the above and foregoing notice, is hereby confessed and acknowledged, at Denver, Colorado, this 15th day of September, A. D. 1910.

GERALD HUGHES,
C. C. DORSEY,
W. V. HODGES,
A. M. STEVENSON,
Solicitors for the Cross-Complainant, The Denver Union Water Company.

Endorsed: No. 5572. U. S. Circuit Court of Colorado. The New York Trust Company, Complainant, vs. The City and County of Denver and others, Defendants. The Denver Union Water Co., Cross-Complainant vs. The City and County of Denver and others, Defendants to Cross-Bill. Notice of Application for Order Allowing Appeal on Cross-Bill. Filed Sep. 21, 1910. Charles W. Bishop, Clerk. Charles W. Waterman, Counsel at Law, Denver, Colorado.

In the Circuit Court of the United States within and for the District of Colorado.

477 In Equity. No. 5572.

Original Bill.

THE NEW YORK TRUST COMPANY, a Corporation, Complainant,

vs.

THE CITY AND COUNTY OF DENVER, a Municipal Corporation; Robert W. Speer, as Mayor of the City and County of Denver; Burt F. Davis, as Clerk of said City and County of Denver; Albion K. Vickery, as Auditor of said City and County of Denver; Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows, as Members of and Constituting the Public Utilities Commission of said City and County of Denver; Ellis Meredith, A. E. Mauff and Harry Petrie, as Members of and Constituting the Election Commission of said City and County of Denver; The Denver Union Water Company, a Corporation; and The South Platte Canal and Reservoir Company, a Corporation, Defendants.

Cross-Bill.

THE DENVER UNION WATER COMPANY, a Corporation, Cross-Complainant,

vs.

THE CITY AND COUNTY OF DENVER; ROBERT W. SPEER, as Mayor of the City and County of Denver; Burt F. Davis, as Clerk of said City and County of Denver; Albion K. Vickery, as Auditor of said City and County of Denver; Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows, Claiming to be and Assuming to act as Members of and Constituting the Public Utilities Commission of said City and County of Denver; Ellis Meredith, A. E. Mauff and Harry Petrie, as Members of and Constituting the Election Commission of said City and County of Denver; and The New York Trust Company, Defendants to the Cross-Bill.

Notice.

To The New York Trust Company, a Corporation, One of the Defendants to the Above Mentioned Cross-Bill:

You are hereby invited to join with the undersigned defendants to the above mentioned cross-bill, on or before Tuesday, the 20th day of September, A. D. 1910, to prosecute an appeal, in the matter of the above entitled cross-bill, to the United States Circuit Court of Appeals for the Eighth Judicial Circuit, from that certain order and decree of injunction made and entered upon the above mentioned cross-bill, on the 6th day of September, A. D. 1910, upon the motion and application of said The Denver Union Water Company, Cross-Complainant therein, and to appear in open Court on

the said 20th day of September, A. D. 1910, at ten o'clock
478 in the forenoon of said day, or as soon thereafter as counsel can be heard, and either join in said appeal, or decline to join therein, or you will be deemed to have acquiesced in the said order and decree of injunction made upon said cross-bill upon the application of the said cross-complainant, and the undersigned defendants will prosecute said appeal without joining you as a party.

THE CITY AND COUNTY OF DENVER,
A Municipal Corporation;
ROBERT W. SPEER,
As Mayor of the City and County of Denver;
BURT F. DAVIS,
As Clerk of Said City and County of Denver;
ALBION K. VICKERY,
As Auditor of Said City and County of Denver;
ELLIS MEREDITH,
A. E. MAUFF AND
HARRY PETRIE,
As Members of and Constituting the Election Commission of Said City and County of Denver;

By H. A. LINDSLEY AND
G. Q. RICHMOND,
Their Solicitors.
ARMOUR C. ANDERSON,
EDWIN VAN CISE AND
A. LINCOLN FELLOWS,
As Members of and Constituting the Public Utilities Commission of Said City and County of Denver.

By CHARLES S. THOMAS,
CHARLES W. WATERMAN,
Their Solicitors.

The receipt of a copy, and service of the above and foregoing Notice, is hereby confessed and acknowledged, at Denver, Colorado, this 14th day of September, A. D. 1910.

JOEL F. VAILE,
HENRY McALLISTER, JR.,
WILLIAM N. VAILE,
Solicitors for The New York Trust Company, a Defendant to Said Cross-Bill.

Endorsed: No. 5572. U. S. Circuit Court of Colorado. The New York Trust Company, Complainant, vs. The City and County of Denver and others, Defendants. The Denver Union Water Co., Cross-Complainant, vs. The City and County of Denver and others, Defendants to Cross-Bill. Notice of Severance on Cross-Bill. Filed Sept. 21, 1910. Charles W. Bishop, Clerk. Charles W. Waterman, Counselor at Law, Denver, Colorado.

479 In the Circuit Court of the United States within and for the District of Colorado.

In Equity. No. 5572.

THE NEW YORK TRUST COMPANY, a Corporation, Complainant,

vs.

THE CITY AND COUNTY OF DENVER, a Municipal Corporation; Robert W. Speer, as Mayor of the City and County of Denver; Burt F. Davis, as Clerk of said City and County of Denver; Albion K. Vickery, as Auditor of said City and County of Denver; Armour C. Anderson, Edwin Van Cise, and A. Lincoln Fellows, as Members of and Constituting the Public Utilities Commission of said City and County of Denver; Ellis Meredith, A. E. Mauff, and Harry Petrie, as Members of and Constituting the Election Commission of said City and County of Denver; The Denver Union Water Company, a Corporation, and The South Platte Canal and Reservoir Company, a Corporation, Defendants.

Original Bill.

THE DENVER UNION WATER COMPANY, a Corporation, Cross-Complainant,

vs.

THE CITY AND COUNTY OF DENVER, ROBERT W. SPEER, as Mayor of the City and County of Denver; Burt F. Davis, as Clerk of said City and County of Denver; Albion K. Vickery, as Auditor of said City and County of Denver; Armour C. Anderson, Edwin Van Cise, and A. Lincoln Fellows, Claiming to be and Assuming to Act as Members of and Constituting the Public Utilities Commission of said City and County of Denver; Ellis Meredith, A. E. Mauff, and Harry Petrie, as Members of and Constituting the Election Commission of said City and County of Denver; and The New York Trust Company, Defendants to the Cross-Bill.

Cross-Bill.

Prayer for Appeal.

The defendants, The City and County of Denver, a Municipal Corporation; Robert W. Speer, as Mayor of the City and County of Denver; Burt F. Davis, as Clerk of said City and County of Denver; Albion K. Vickery, as Auditor of said City and County of Denver; Ellis Meredith, A. E. Mauf and Harry Petrie, as Members of and Constituting the Election Commission of said City and County of Denver; Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows, as Members of and Constituting the Public Utilities Commission of said City and County of Denver, conceiving themselves aggrieved by that certain order and decree of injunction made
480 and entered on the 6th day of September, A. D. 1910, upon the above entitled cross-bill, and upon the motion and appli-

cation of the cross-complainant therein, The Denver Water Company, do hereby appeal from the said order and decree, to the United States Circuit Court of Appeals for the Eighth Judicial Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and they and each of them pray that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order and decree was made and entered, duly authenticated, may be sent forthwith to the said United States Circuit Court of Appeals for the Eighth Judicial Circuit.

They further represent and say that the defendant to said cross-bill, to-wit, The New York Trust Company, has been duly cited and notified, requested and invited, to join in this appeal, and that said The New York Trust Company has refused to join in this appeal, as appears by the notice and proof of service filed herewith.

THE CITY AND COUNTY OF DENVER,
A Municipal Corporation;
ROBERT W. SPEER,
As Mayor of the City and County of Denver;
BURT F. DAVIS,
As Clerk of Said City and County of Denver;
ALBION K. VICKERY,
As Auditor of Said City and County of Denver;
ELLIS MEREDITH,
A. E. MAUFF, AND
HARRY PETRIE,
As Members of and Constituting the Election Commission of Said City and County of Denver.

By H. A. LINDSLEY,
G. Q. RICHMOND,
Their Solicitors.

ARMOUR C. ANDERSON,
EDWIN VAN CISE, AND
A. LINCOLN FELLOWS,
As Members of and Constituting the Public Utilities Commission of Said City and County of Denver,

By CHARLES S. THOMAS,
CHARLES W. WATERMAN,
Their Solicitors.

Endorsed: No. 5572. U. S. Circuit Court of Colorado. The New York Trust Company, Complainant, vs. The City and County of Denver and others, Defendants. The Denver Union Water Co., Cross-complainant vs. The City and County of Denver and others, Defendants to Cross-Bill. Prayer for Appeal on Cross-Bill. Filed Sep. 21, 1910. Charles W. Bishop, Clerk. Charles W. Waterman, Counselor at Law, Denver, Colorado.

481

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the Circuit Court of the United States in and for said District.

No. 5572. In Chancery.

THE NEW YORK TRUST COMPANY, Complainant,
vs.
THE CITY AND COUNTY OF DENVER, ROBERT W. SPEER, as Mayor of the City and County of Denver; Burt F. Davis, as Clerk of said City and County of Denver; Albion K. Vickery, as Auditor of said City and County of Denver; Armour C. Anderson, Edwin Van Cise, and A. Lincoln Fellows, as Members of and Constituting the Public Utilities Commission of said City and County of Denver; Ellis Meredith, A. E. Mauff, and Harry Petrie, as Members of and Constituting the Election Commission of said City and County of Denver; The Denver Union Water Company, and The South Platte Canal and Reservoir Company, Defendants.

THE DENVER UNION WATER COMPANY, Complainant,
vs.
THE CITY AND COUNTY OF DENVER, ROBERT W. SPEER, as Mayor of the City and County ——; Burt F. Davis, as Clerk of said City and County of Denver; Albion K. Vickery, as Auditor of said City and County of Denver; Armour C. Anderson, Edwin Van Cise, and A. Lincoln Fellows, Claiming to be and Assuming to Act as Members of and Constituting the Public Utilities Commission of said City and County of Denver; Ellis Meredith, A. E. Mauff, and Harry Petrie, as Members of and Constituting the Election Commission of said City and County of Denver, and The New York Trust Company, Defendants.

Cross-Bill.

Come now the City and County of Denver, Robert W. Speer as mayor of the City and County of Denver, Burt F. Davis as clerk thereof, Albion K. Vickery as auditor thereof, Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows claiming to be and assuming to act as members of and constituting the Public Utilities Commission of said City and County of Denver, Ellis Meredith, A. E. Mauff, and Harry Petrie as members of and constituting the Election Commission of said City and County of Denver, appealing defendants, and file this their assignment of errors upon which they and each of them will rely upon their appeal from the interlocutory judgment and order made by this Honorable Court on the
482 sixth day of September, A. D. 1910, granting a preliminary injunction on said cross bill for the said Denver Union Water Company.

Said circuit court erred in making said interlocutory order grant-

ing an injunction on said cross bill, for the following reasons and each of them.

First. The said court had no jurisdiction of said cross bill, (A) because it had no jurisdiction of the original bill; (B) because neither the said cross bill nor the exhibits appended thereto and made a part thereof state or raise any question arising under the Constitution of the United States or amendments thereto or laws or treaties made thereunder; (C) the jurisdiction of the case must depend upon the averments of fact presented by the original bill and not otherwise and the court erred in entertaining jurisdiction thereof and in holding that any federal question was presented by the allegations of said cross bill.

Second. Said court did not arrange the parties to the original bill herein according to their respective interests, which if done would have identified the cross complainant with the complainant and destroyed the necessary diversity of citizenship of the parties, thus ending its jurisdiction based on such diversity.

Third. There was and is no equity in the said cross bill, no right of relief thereunder either interlocutory or final in its character.

Fourth. There was and is no impairment of the obligation of any contract set forth in said cross bill and exhibit made a part thereof, by reason of any act or thing done or threatened to be done as charged therein against these appealing defendants or either or any of them, and the court erred in holding otherwise.

Fifth. The original action was brought, and the bill and cross bill framed, collusively by the original complainant and the cross Complainant and The South Platte Canal and Reservoir Company, as shown by the record herein, and the court erred in not dismissing the bill and cross bill upon the hearing for an injunction.

Sixth. The court erred in granting the preliminary writ of injunction as prayed for in the said cross bill.

Seventh. Neither Ordinance 44, Series of 1890, nor 163, Series of 1907, in any manner prevents the appellant City and County from constructing a water system of its own, and the circuit court erred in holding otherwise.

483 Eighth. Section 264*a* of the city and county charter does not in its terms nor will the execution thereof impair the obligation of any contract between the city of Denver or the City and County of Denver and the said cross complainant or its predecessors, or either of them, and the circuit court erred in holding otherwise.

Ninth. The circuit court erred in the reasons and each of them assigned by it for its order granting said preliminary writ of injunction on said cross complaint.

Tenth. It appears from the record that the cross complainant did not perform or comply with many of the requirements and contracts of ordinance 44, series of 1890, by reason whereof it is entitled to no relief prayed for thereunder, and the circuit court erred in holding otherwise.

Eleventh. It appeared from the record that The Denver Water Company and The Citizens Water Company, of which companies the cross complainant company is the successor, had estopped themselves

by decree of the district court of the county of Arapahoe, state of Colorado, in a cause between them of which it had jurisdiction, from asserting any exclusive right to the streets of the City and County of Denver or any exclusive right to furnish and supply the said city and county and the inhabitants thereof with water; and the circuit court erred in not so declaring and in not dismissing the bill and cross bill.

Twelfth. It appeared from the record that ordinance No. 163, series of 1907, had not been executed and could not be executed, so that nothing could be claimed thereunder or predicated thereon as against these appealing defendants, and the court erred in not so holding and in not dismissing said bill and cross bill.

Thirteenth. It appeared from the record in said cause that certain clauses of said Ordinance No. 44 of the series of 1890 had been adjudged void and impossible of execution, so that the same could not be renewed, and the circuit court erred in not holding accordingly and dismissing said bill and cross bill.

Fourteenth. It appeared from the record in said cause that the said Ordinance 44, series of 1890, contained impossible covenants and provisions, as declared by the said cross complainant, and the court erred in not so holding and dismissing said bill and cross bill.

484 Fifteenth. The court erred in holding that the appellant city and County of Denver had been derelict in the performance of and had not performed its duty under the provisions of ordinance 163 and that the burden was and had been upon it alone to make said provisions effective or to secure their rejection, and in exempting the cross complainant from any such duty or obligation.

Sixteenth. The circuit court erred in granting any injunction whatever upon the cross bill or in favor of the cross complainant The Denver Union Water Company against these appealing defendants or any of them.

Seventeenth. The circuit court erred in other matters and things apparent on the face of the record.

Wherefore the appealing defendants pray that the said judgment and interlocutory order entered as aforesaid upon the said cross bill be in all things set aside, annulled, reversed, and for naught held, and that said appealing defendants recover their costs, to be taxed against said cross complainant.

HARRY A. LINDSLEY,
GEO. Q. RICHMOND,
Sol'rs for City & County of Denver, R. W. Speer, as Mayor, et al.
CHAS. W. WATERMAN,
CHAS. S. THOMAS,
Sol'rs for Public Utilities Commission, Election Commission and Individual Members Thereof.

Endorsed: No. 5572. United States of America, District of Colorado. In the Circuit Court. The New York Trust Company, complainant, vs. The City and County of Denver et al., defendants. The

Denver Union Water Company, complainant, vs. The City and County of Denver et al., defendants. Cross bill. Assignment of Errors. Filed Sep. 21, 1910. Charles W. Bishop, Clerk.

5572. In Chancery.

THE NEW YORK TRUST COMPANY
vs.
THE CITY AND COUNTY OF DENVER, ROBERT W. SPEER, as Mayor of the City and County of Denver; Burt F. Davis, as Clerk of said City and County of Denver; Albion K. Vickory, as Auditor of said City and County of Denver; Armour C. Anderson, Edwin Van Cise, and A. Lincoln Fellows, as Members of and Constituting the Public Utilities Commission of said City and County of Denver; Ellis Meredith, A. E. Mauff, and Harry Petrie, as Members of and Constituting The Election Commission of said
485 City and County of Denver; The Denver Union Water Company and The South Platte Canal and Reservoir Company.

Bill for Injunction and for Other Relief.

Now on this 21st day of September, A. D. 1910, the same being one of the regular juridical days of the May, A. D. 1910, term of said court, came the defendants The City and County of Denver, a municipal corporation, Robert W. Speer, as mayor of the City and County of Denver, Burt F. Davis, as clerk of said City and County of Denver, Albion K. Vickery, as auditor of said City and County of Denver, Armour C. Anderson, Edwin Van Cise, and A. Lincoln Fellows, as members of and constituting the Public Utilities Commission of said city and county of Denver, Ellis Meredith, A. E. Mauff, and Harry Petrie, as members of and constituting the Election Commission of said City and County of Denver, and present their petition in writing for an appeal from that certain order and decree of injunction granted upon the above mentioned cross-bill in said cause on the 6th day of September, A. D. 1910, to the United States circuit court of appeals for the eighth judicial circuit, together with an assignment of errors accompanying the same; which petition, upon consideration of the court is hereby granted and allowed, and the court hereby allows an appeal from said order and decree entered upon said cross-bill to the said United States circuit court of appeals for the eighth judicial circuit upon the filing of a bond in the penal sum of five hundred dollars ($500) with good and sufficient security to be approved by the court. And it further appearing that the defendant to said cross-bill, to-wit, The New York Trust Company, a corporation, has been duly notified in writing, to appear in open court on this, the 20th day of September, A. D. 1910, and either join in said appeal or decline to join therein, and in further appearing that the said The New York Trust Company has refused to join in said appeal, and has severed itself in its defense in this court, the said The City and County of Denver, a

municipal corporation; Robert W. Speer, as mayor of the City and County of Denver, Burt F. Davis, as clerk of said City and County of Denver; Albion K. Vickery, as auditor of said City and County of Denver, Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows, as members of and constituting the Public Utilities Commission of said City and County of Denver; Ellis Meredith, A. E. Mauff, and Harry Petrie, as members of and constituting the Election Commission of said City and County of Denver, are hereby granted their appeal as aforesaid from said order and decree
486 of injunction upon said cross-bill, and their interests are severed in said appeal from the said The New York Trust Company.

UNITED STATES OF AMERICA,
District of Colorado, ss:

Know all men by these presents that we, The City and County of Denver, a municipal corporation, Robert W. Speer as mayor of the City and County of Denver, Burt F. Davis as clerk of said City and County of Denver, Albion K. Vickery as Auditor of said City and County of Denver, Armour C. Anderson, Edwin Van Cise, and A. Lincoln Fellows as members of and constituting the Public Utilities Commission of said City and County of Denver, Ellis Meredith, A. E. Mauff, and Harry Petrie as members of and constituting the Election Commission of said City and County of Denver, as principals, and National Surety Company as surety, are held and firmly bound unto The Denver Union Water Company in the full and just sum of five hundred dollars to be paid to the said Denver Union Water Company or assigns, for which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals, and dated this 13th day of September in the year of our Lord one thousand nine hundred and ten.

Whereas lately, at the May Term, A. D. 1910, of the circuit court of the United States for the district of Colorado, sitting at Denver, in a suit pending in said court between the New York Trust Company, complainant, and the above named principal obligors, impleaded with The Denver Union Water Company and The South Platte Canal and Reservoir Company, the said above named Denver Union Water Company did file a cross bill against the above named principal obligors together with the said New York Trust Company, respondent, and an order and interlocutory decree was entered against the said City and County of Denver, Robert W. Speer as mayor of the City and County of Denver, Burt F. Davis, as clerk of said City and County of Denver, Albion K. Vickery as auditor of said City and County of Denver, Armour C. Anderson, Edwin Van Cise, and A. Lincoln Fellows as members of and constituting the Public Utilities Commission of said City and County of Denver, and each and every of them, restraining and enjoining them from issuing or attempting to issue the bonds or any of the bonds described and set forth in section 264*a* of the charter of the City and County of Denver and ordinance 96 of the series of 1910, for any

purpose whatsoever, and from interfering or attempting to
487 interfere with or obstructing or attempting to obstruct the said Denver Union Water Company in the exercise and enjoyment of its contract and franchise right under ordinance 44 of the series of 1890 and ordinance 163 of the series of 1907 and otherwise, and from doing or attempting to do any act or thing tending to accomplish such purposes, until the further order of the court in the premises; and the said above named principal obligors having prayed and been allowed an appeal to the United States Circuit Court of Appeals for the eighth circuit to reverse the judgment and order aforesaid in the aforesaid suit, and a citation directed to the said The Denver Union Water Company citing and admonishing it to be and appear in the United States Circuit Court of Appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the date of the said citation;

Now the condition of the above obligation is such that if the said above named parties as principal obligors herein shall prosecute said appeal to effect, and answer all damages and costs if they fail to make good said plea, then the above obligation to be void, else to remain in full force and virtue.

THE CITY AND COUNTY OF DENVER,
By R. W. SPEER, *Mayor.*

[Seal, City & County of Denver.]

Attest:
BURT F. DAVIS,
Clerk of the City and County of Denver,
By J. A. DOWSON,
Deputy Clerk.

ROBERT W. SPEER, *as Mayor.* [L. S.]
BURT F. DAVIS, *as Clerk.* [L. S.]
ALBION K. VICKERY, *as Auditor.* [L. S.]
ARMOUR C. ANDERSON, [L. S.]
EDWIN VAN CISE, [L. S.]
A. LINCOLN FELLOWS, [L. S.]
Constituting the Public Utilities Commission.

ELLIS MEREDITH, [L. S.]
ALBERT E. MAUFF, [L. S.]
HARRY PETRIE, [L. S.]
Constituting the Election Commission.

488 NATIONAL SURETY COMPANY,
By RALPH W. SMITH,
Attorney in Fact.

[Corporate Seal, National Surety Co.]

Signed, sealed and delivered in presence of

_____

_____

Approved.
ROB'T E. LEWIS, *Judge.*

Endorsed: 5572. United States of America, district of Colorado. In the circuit court. The New York Trust Company, a corporation, complainant, vs. The City and County of Denver, a municipal corporation, et al., defendants. Appeal Bond $500.00 to The Denver Union Water Company. Filed Sep. 21, 1910. Charles W. Bishop, Clerk.

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the Circuit Court of the United States in and for said District.

No. 5572. In Chancery.

THE NEW YORK TRUST COMPANY, Complainant,
vs.
THE CITY AND COUNTY OF DENVER et al., Defendants.

No. 5572. Cross Bill.

THE DENVER UNION WATER COMPANY, Complainant,
vs.
THE CITY AND COUNTY OF DENVER et al., Defendants.

Præcipe for Record.

To the clerk of the above court:

You will please at once make a transcript of the record in said cause, consisting of pleadings, orders of court, affidavits, and other documentary evidence offered at the hearing on application for injunction on bill and cross-bill, copy of injunction, notice of appeal, summons and severance, and notices thereof, orders allowing appeals and severance, copies of appeal bonds, citation, and all other matters and things belonging to said record, that the same may be used on appeal from the order granting interlocutory injunctions on said bill and cross-bill to the circuit court of appeals for the eighth judicial circuit.

489 Dated at Denver, Colorado, this 21st day of September, A. D. 1910.

H. A. LINDSLEY,
CHAS. W. WATERMAN,
C. S. THOMAS,
Attorneys for Defendants Appealing.

Endorsed: 5572. U. S. Circuit Court, district of Colorado. The New York Trust Company vs. The City and County of Denver et al. Præcipe for Transcript on Appeal. Filed Sep. 21, 1910. Charles W. Bishop, Clerk. H. A. Lindsley, C. W. Waterman, C. S. Thomas, for respondents.

Citation on Appeal.

UNITED STATES OF AMERICA,
Eighth Judicial Circuit, ss:

In the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

The United States of America to The New York Trust Company, a Corporation; The Denver Union Water Company, a Corporation, and The South Platte Canal and Reservoir Company, a Corporation, Greeting:

You, And Each Of You, are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Judicial Circuit, at the City of St. Louis, in the State of Missouri, sixty days from and after the day this citation bears date, pursuant to an appeal allowed by the Circuit Court of the United States for the District of Colorado, sitting at Denver, wherein The City and County of Denver, a Municipal Corporation; Robert W. Speer, as Mayor of the City and County of Denver; Burt F. Davis, as Clerk of said City and County of Denver; Albion K. Vickery, as Auditor of said City and County of Denver; Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows, as Members of and Constituting the Public Utilities Commission of said City and County of Denver; Ellis Meredith, A. E. Mauff and Harry Petrie, as Members of and Constituting the Election Commission of said City and County of Denver, are appellants, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellants, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, The Honorable Robert E. Lewis, Judge of the District Court of the United States for the District of Colorado, and Ex-Officio Judge of the Circuit Court of the United States for the
490 District of Colorado, at Denver, in said District, this 21st day of September, A. D. 1910.

ROBT. E. LEWIS, *Judge.*

Due and legal service of the within and foregoing citation, together with the receipt of a copy thereof, is hereby confessed and acknowledged at Denver, Colorado, this 21st day of September, A. D. 1910.

JOEL F. VAILE,
HENRY McALLISTER, JR.,
WILLIAM N. VAILE,
Solicitors for The New York Trust Company.

GERALD HUGHES,
C. C. DORSEY,
W. V. HODGES,
A. M. STEVENSON,
Solicitors for The Denver Union Water Company and The South Platte Canal and Reservoir Company.

No. 5572. United States Circuit Court of Appeals, Eighth Circuit. **The City and County of Denver, and Others, Appellants, vs.**

The New York Trust Company, The Denver Union Water Company and The South Platte Canal and Reservoir Company, Appellees. Orig. Citation on Bill. Filed Sep. 21, 1910. Charles W. Bishop, Clerk. Filed Sep. 24, 1910. John D. Jordan, Clerk.

Citation on Appeal.

UNITED STATES OF AMERICA,
Eighth Judicial Circuit, ss:

In the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

The United States of America to The Denver Union Water Company, a Corporation, and to The New York Trust Company, a Corporation, Greeting:

You, And Each Of You, are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Judicial Circuit, at the City of St. Louis, in the State of Missouri, sixty days from and after the day this citation bears date, pursuant to an appeal allowed by the Circuit Court of the United States for the District of Colorado, sitting at Denver, wherein The City and County of Denver, a Municipal Corporation; Robert W. Speer, as Mayor of the City and County of Denver; Burt F. Davis, as Clerk of said City and County of Denver; Albion K. Vickery, as
491 Auditor of said City and County of Denver; Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows, as Members of and Constituting the Public Utilities Commission of said City and County of Denver; Ellis Meredith, A. E. Mauff and Harry Petrie, as Members of and Constituting the Election Commission of said City and County of Denver, are appellants, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellants, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, The Honorable Robert E. Lewis, Judge of the District Court of the United States for the District of Colorado, and Ex-Officio Judge of the Circuit Court of the United States for the District of Colorado, at Denver, in said District, this 21st day of September, A. D. 1910.

ROBT. E. LEWIS, *Judge.*

Due and legal service of the within and foregoing citation, together with the receipt of a copy thereof, is hereby confessed and acknowledged at Denver, Colorado, this 21st day of September, A. D. 1910.

GERALD HUGHES,
C. C. DORSEY,
W. V. HODGES,
A. M. STEVENSON,
Solicitors for The Denver Union Water Company.
JOEL F. VAILE,
HENRY McALLISTER, JR.,
WILLIAM N. VAILE,
Solicitors for The New York Trust Company.

No. 5572. United States Circuit Court of Appeals, Eighth Circuit. The City and County of Denver, and Others, Appellants, vs. The Denver Union Water Company and The New York Trust Company, Appellees. Cross-Citation on Cross-Bill. Filed Sep. 21, 1910. Charles W. Bishop, Clerk. Filed Sep. 24, 1910. John D. Jordan, Clerk.

UNITED STATES OF AMERICA,
District of Colorado, ss:

I, Charles W. Bishop, clerk of the circuit court of the United States for the district of Colorado, do hereby certify the above and foregoing pages, bound in two volumes, and numbered from one (1) to one hundred seventy-six (176), and from one hundred seventy-seven (177) to three hundred sixty-seven (367), all numbers inclusive, to be a true, perfect, and complete transcript and
492 copy of the record, documentary evidence, affidavits; notices of application for orders allowing appeal and of severance, prayer for appeal, assignment of errors and bond on appeal; and notices of application for order allowing cross-appeal and of severance, prayer for cross-appeal, assignment of errors and bond on cross-appeal, and all proceedings in the case, as directed in the praecipe filed herein, together with a true copy of such praecipe, heretofore filed or entered of record in said court and in a certain cause lately in said court pending wherein The New York Trust Company was complainant and The City and County of Denver, Robert W. Speer as Mayor of the City and County of Denver, Burt F. Davis as Clerk of said City and County of Denver, Albion K. Vickery as Auditor of said City and County of Denver; Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows as members of and constituting the Public Utilities Commission of said City and County of Denver; Ellis Meredith, A. E. Mauff, and Harry Petrie as members of and constituting The Election Commission of said City and County of Denver, The Denver Union Water Company and The South Platte Canal and Reservoir Company were respondents, as fully and completely as the same still remain on file and of record in my office at Denver.

And I further certify that I have annexed to and transmit herewith a copy of all opinions heretofore handed down and filed in said cause.

In Testimony to the above, I do hereunto sign my name and affix the seal of said court, at the City and County of Denver, in said district, this twenty-second day of September, A. D. 1910.

[Seal U. S. Circuit Court, District of Colorado.]

CHARLES W. BISHOP, *Clerk.*

Filed Sep. 24, 1910.
JOHN D. JORDAN, *Clerk.*

In the Circuit Court of the United States within and for the District of Colorado.

No. 5572. In Equity.

THE NEW YORK TRUST COMPANY, Complainant,
vs.
THE CITY AND COUNTY OF DENVER et al., Defendants.

Opinion of the Court.

LEWIS, *District Judge* (orally):

This argument has been unusually prolonged, but it has been interesting every moment. It has been a great pleasure to the court to hear counsel. That is necessarily so when we consider
493 the eminent ability of counsel who have appeared for the defendants, those of the defendants who have seen fit to participate here, for they have been some years at the bar and have more than local reputation. May I be permitted to say that I doubt whether the three young gentlemen at the bar who presented this case for the complainant and the cross-complainant are excelled in ability at any other bar by men of equal age and experience. If time permitted, I should take great pleasure in reducing my views of the issues presented here to writing, but it does not permit; and besides that, my own investigation is not so important after such a thorough discussion by counsel and review of authorities that are found applicable to the issues. I could not hope to find much other law than has here been presented.

The argument of the defendants attacks the jurisdiction of the court, and it has been presented with great plausibility. It is said, first, that the complainant trust company, although a non-resident, has not such an interest as will enable it to maintain the character of suit which it sets up in its bill, and even if that were true, the respondent water company is allied in interest with the complainant trust company, and must therefore be arranged on the side of the complainant, and that that would defeat the jurisdiction of the court. It is not necessary, as clearly announced in the 213th U. S. for the court to determine finally the question of jurisdiction on which the bill and cross-bill are based. The cross-bill clearly invokes the protection of clause 1, section 10 of Article 1 of the Constitution and of section 4 of Article 4 and also of the 14th Amendment. It might be important, although it is a trite learning at the bar, to notice for a few moments, inasmuch as we have been complimented with the attendance of many who are not members of the bar and who are not thoroughly familiar with the principles announced in the constitution, to make a slight reference to the purpose of the constitutional provisions which are invoked as a protection both to the complainant and the cross-complainant in this case.

Prior to the formation of the constitution of the United States

there was no protection against the dissolution of a contract by legislative bodies that had jurisdiction over the subject matter. A provision was inserted in the constitution (Section 10, of Article 1) which provided that no state shall pass any law impairing the obligation of a contract.

Before the formation of that constitution, the Crown had granted a charter to Dr. Wheelock and his associates of Dartmouth College, in New Hampshire. Subsequently, and after the constitution
494 was formed, it was undertaken by the state of New Hampshire to modify, to change, not to strike down and wipe out, that grant from the Crown, but to simply modify it, to change the number of its directors over the management of the institution, the expenditure of any funds which it owned, the selection of its board of teachers, and so forth; and the question was presented to the courts, and Governor Thomas and some of the other attorneys have referred to that case, because it is a great landmark in American jurisprudence on that question, and I believe has been said by Justice Miller to have had a more far reaching effect on the legislation of this country than any other provision in that constitution.

It was conceded in the argument of that case that but for that constitutional provision, that charter might have been changed, might have been wiped out, if those who had granted it saw fit to destroy it, and there would have been no power to prevent. But this provision was inserted in the constitution, and the great Chief Justice in considering the purpose of section 10, Article 1, said, among other things, in a very lengthy opinion:

Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the constitution viewed with some apprehension the violent acts which might grow out of the feelings of the moment, and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed.

The whole purpose of that provision is expressed in the language quoted. We yet live under that constitution. The people have a perfect right to abolish it, to enact another constitution, to establish another form of government. But by that constitution they declared that it was the supreme law of the land, and every man must obey. That section of the constitution against the impairment of the obligations of a contract by state legislation is here invoked, both by the trust company and the cross-complainant water company. It has been repeatedly held, and counsel for defendants do not deny the proposition that that amendment to the constitution covers not only legislative acts of the state, but legislative acts of the subordinate divisions of the state, as cities; because those cities, in enacting legislation, are only administering a part of the power vested in the state, which has been delegated to them by the state, and consequently it has been so often held that it is never now questioned, that if a city ordinance violates that provision of the constitution, it is the duty of the courts to stay its enforcement.

495 The inquiry here is whether or not section 264-A of the charter is in violation of that provision of the constitution.

The defendants, as I said a moment ago, challenge the jurisdiction of the court. Mr. Waterman says, to be specific as to his contention, if I correctly understand it, that, first, he does not concede that the cross-complainant clearly enough invokes that guarantee and protection of the constitution, but that if it does, then he raises another objection which will be in a moment noted.

I can not help but feel that this cross-complaint, read in a fair and unprejudiced way, invokes not only the provision of section 10 of article 1 of the Constitution, but of the 14th Amendment and section 4 of article 4. It ought really only be necessary to read paragraph 15 of the cross-complaint, wherein that provision of the constitution prohibiting any state from passing any law that impairs the obligation of a contract is invoked as against the rights of the cross-complainant, both under ordinance No. 44 and under ordinance 163. It is impossible to read that paragraph and say otherwise. So that it is clear enough to me that the cross-complainant does invoke the protection of section 10 of article 1 of the constitution.

But Mr. Waterman says that even if the court should find that on the face of the cross-complaint it can be said that the cross-complainant asks the protection of the court against the effects of 264-A as being in violation of that provision of the constitution, yet, he says, when we read the exhibits attached to the cross-complaint and therein find that in neither ordinance 44 nor ordinance 163 is there any exclusive grant given to the water company to furnish the city and its inhabitants with water, that the protection as against that can not be said to be called in question on the face of the bill, because, he says, the Supreme Court has decided many times that where the right is not exclusive, the city may build its own plant. If that is the only question involved here we would at once concede the correctness of Mr. Waterman's position; and the conclusion that he arrives at is tenable and could not be disputed; but we are not concerned with that question at all. The question with which we are involved here is the rights of the cross-complainant under ordinance 44 and ordinance 163, and if the present acts in the passage and in the execution of amendment 264-A are in violation of the obligations of a contract, the terms of the contract embodied in ordinance 44 and ordinance 163, then it is clearly raised on the cross-bill.

As I said a moment ago, it is not necessary, and the Supreme Court has so advised me, that this court determine now con-
496 clusively for the purposes of this case the correctness of the contention of the cross-complainant in that respect. Indeed the Supreme Court says in 213 U. S., that if this court should finally determine that that question in not in the record, and that section 264-A in no manner violates Section 10, Article 1, of the constitution of the United States, yet if the question in the pleadings is raised in good faith and has not been foreclosed by prior opinions of the Supreme Court, as noted in a case by Mr. Waterman this morning, and can be said to be fairly debatable, notwithstanding the court should determine that question against the complainant and cross-complainant, yet jurisdiction having attached under the bill and

cross-bill, the court may proceed and decide the case, and it is its duty to do so, on merely local questions, aside from any constitutional rights.

Let us see whether or not section 264-A in any manner impairs the obligation of the contract between the city and the water company as embodied in ordinance 44 and ordinance 163.

We notice first ordinance 163, looking at that ordinance alone and the contract embodied in it. That ordinance provided, as has been repeatedly said, that the property should be appraised, that this appraised value and the schedule of rates to be fixed by the appraisers for the next twenty years should be submitted to the qualified electors. The ordinance itself framed the question that should be submitted to them and said that they should vote no or yes upon the propositions. The appraisers proceeded to make the apprais-ment. They did not make the schedule. Thereupon the city, notwithstanding the company was continuing to supply water to the city and its inhabitants as theretofore, immediately turned and sought to adopt and to carry out the provisions of section 264-A Mr. Waterman and Governor Thomas contend that, even so, and even if the Public Utilities Commission proceeded to execute the provisions of section 264-A, it does not violate or impair the obligation of the contract set forth in ordinance 163. I cannot see, as said repeatedly to counsel in the argument, in which I made the suggestions for the purpose of inquiry and to be enlightened on the question involved—but what that conduct does impair that obligation. The parties agreed, not only in accordance with the dry words in the terms of that ordinance, but in making that agreement we must believe that both of them, understanding fully the terms of their contract, acting as private citizens, bound in the same manner that private citizens are bound, said, "Before taking up the matter of municipal ownership, before anything else touching your rights
497 shall intervene, we will let this community, by its tax-paying citizens, who must bear the burden as to whatever is done, determine whether they will buy your plant at the appraised value, or whether they give you a new contract on this schedule of rates to be affixed by appraisement." The city stopped at the point where the appraisers only fixed the value of the plant, not ascertaining the reasonable schedule that the contract required, and proceeded to enact section 264-A, and threaten now to execute its terms. It is alleged in the cross-bill, I think it is true in fact under the constitution and laws of the state of Colorado, that these officials of the city have no right to burden this town with two water plants, each equal to serving all the necessities and requirements of the city and its inhabitants. So that if they build this plant as provided under the terms of Section 264-A, I cannot otherwise believe than that they will render themselves not only unable financially, but unable in law to acquire another plant. Not only that, but proceeding to build a plant of its own under section 264-A, with ordinance 163 yet unexecuted, an executory contract protected by the impairment clause, they necessarily put every tax-paying voter in the attitude of deciding in the negative.

Can it be believed that any man who owns property taxable in this town, after the city has built its own plant under section 264-A when these questions provided for in ordinance 163 are presented to him for his determination, will elect either to buy the plant or to extend the contract for twenty years?

Beyond that there is another reason why the proposed acts under ordinance 264-A are an impairment of the obligation of the city to the water company. We find that ordinance 163 does not cancel and [rescord] ordinance 44. It is still in existence. It is supplemental to it. Under ordinance 44 it was the duty of the city council, as the law then stood, when the contract was originally made, to exercise the option to buy or not to buy, to extend the contract or not to extend it. But they changed it by ordinance 163, and the water company consented that that determination might be made by the tax-paying voters. Ordinance 163, as I said a moment ago, does not rescind and wipe out ordinance 44. On its very face, ordinance 163, by its very terms, provides that after everything has been done by the water company and the city under ordinance 163, the rights, whatever they may be, in the water company, under ordinance 44, shall yet remain to it. I am not determining that it has any rights under ordinance 44, but that is the term of the contract. It is at least seriously debatable as to whether or not, on the clear wording of ordinance 44, it has not some rights, because it grants this
498 franchise and says that the company shall be the owner of and possessed of the same forever, though part of its plant is in the streets. But the city must have recognized that ordinance 163 was only supplemental to ordinance 44. It said whatever rights the company had under ordinance 44 should be preserved to it.

Under ordinance 44 the council was required to make the election. Under ordinance 163, supplemental, it provided that the tax payers might vote on it, but it provided that the rights under ordinance 44 should be preserved to the company. Is it not a fairly debatable question that if ordinance 163 had been complied with and the taxpayers had voted down both propositions, that then the company might claim the right to have the council pass on whether or not they believed the city should buy or the city should extend the contract? It may not be tenable; I may decide otherwise, but inasmuch as ordinance 163 preserves every right given under ordinance 44 we cannot brush aside at the instant, the contention that there were not substantial rights left to the water company under ordinance 44. Section 264-A says that hereafter the council shall exercise no power in the acquisition of a water plant or the granting of a franchise, but that is placed absolutely and unrestrictedly in the hands of the public utilities commission. There was a contract under ordinance 44 that provided otherwise. Section 264-A undertakes to strike that down. I have not the slightest doubt but that section 264-A if carried out in accordance with its terms and as alleged is now threatened by the board of public utilities, that it is an utter violation, not only of a part but of all obligations by which the city is bound under ordinance 44 and ordinance 163. Therefore it would be entirely proper if the water com-

pany had joined with the complainant trust company as complainant and jurisdiction would have existed on the ground that a federal question was raised.

We bear in mind that this provision of the constitution protects not only an effort to destroy a contract and evade all obligations under it, such as the repeal of an ordinance which made the contract itself, but, as said in Ogden v. Saunders, 12 Wheat., "Any law which enlarges, abridges, or in any manner changes the intention of the parties, necessarily impairs the contract itself." Of course the obligation of a contract is the law which binds the parties to its execution.

I do not think it is necessary to pass upon the question of the validity or constitutionality of Section 264-A. I have been in accord with and have always felt it my duty to enforce that principle repeatedly announced by the highest court in the land,
499 that no law should be held unconstitutional by a court unless it is clear and, as said in some cases, beyond doubt. It may be noted in passing, however, that it is rather a remarkable instance. It certainly presses into a small compass as many provisions, some of them treating upon one subject and some upon another, as could well be found in that much language.

I do not feel that it is my duty now or at the conclusion of this case to enter into a consideration of whether or not this amendment to the charter violates the guarantee of a republican form of government. There have been a great many interesting legal articles on the present move throughout the country to curtail legislative power. I do not hesitate to say that to me it is startling. No man denies for a moment that all power in this country rests with the people themselves. It has done so since the formation of the constitution. The constitution they made. They provided the manner in which that power should be exercised. By that constitution they gave to Congress the sole power of legislation. By the constitution- of the several states, they gave to their house of representatives and their senate the sole and exclusive power of legislation. They said in all of those constitutions that they were the supreme law of the land, the supreme law of the state. No man has a right to complain if the people in lawful ways abolish those constitutions and take back to themselves by establishing a pure democracy, not a constitutional democracy which now exists, the exclusive power of legislation and all of the powers of the government? But the alarming situation is that men who understand all of these principles of government will acquiesce in over-riding the constitution not in abolishing it, not first setting it aside and taking back to themselves these power-, but while those constitutions are in force, which they have said are the supreme law of the land and which they bind the courts by solemn oath to enforce, they seek to over-ride constantly. So we have here in Colorado, or will have shortly, in defiance of your constitution, by which you said, "The sole power of legislation shall be vested in a senate and house of representatives", a legislative act which will so far curtail that power that nothing but the shadow of it is left with those bodies; and in the face of it, and in the face of your

supreme law by which you said the senate and house of representatives should have that power, you, it seems to me, say, "We have it." I say I view these matters with alarm, because it is a revolution, against which I have no right to complain, but an unlawful revolution, until those constitutions are abolished or changed and modified.

500 But John Adams perhaps knew as much about the constitution as any man, and he and those with him were patriots. They knew what liberty meant. They reviewed the history of the governments of the world. They of course did not want a monarchy. They did not want a pure democracy, because they felt sure that, having failed in countries of small population, it could not possibly be a success in a country that promised a large population and a wide extent in area. They gave us this republican form of government because in their patriotism they felt it was best to protect the liberty of the people. I am yet convinced they were right. I cannot help but feel that if we drift to a pure democracy, either by abolishing the constitutions or replacing them and then establishing a pure democracy, in the end it will be an utter failure, and that the liberties we now have will be lost in the rule of the majority unrestrained, which history has shown to be more tyrannical than any monarch that ever reigned. It is to be hoped that before the experiment, if not, then, after the experiment, we may again learn that the patriots builded well.

But John Adams, in discussing the provision of the constitution here appealed to, noted the town government in New England. That was an old form of government by which the people in the towns, which were smaller communities, none of them with such population as the city of Denver, ruled by pure democracy. They had their meetings. Everybody came out. They could call them by a very small number; I think less than a dozen could call the meeting. They passed ordinances and they said what the city should do. John Adams said that that form of government in the New England towns, which existed at the time the constitution was formed and continued afterwards, was not, according to his belief that sort of town government at all which infringed this provision of the constitution.

I am not called on, as I take it, to decide that question. I do not feel it is my duty to do so, and I question somewhat any one present is concerned with my personal views, and therefore it may be proper that they should not be further expressed.

Having reached the conclusion that the cross-bill states jurisdictional facts, based upon federal rights, I do not feel that it is necessary to notice in any detail the jurisdiction that I believe has been stated by the complainant. I think it is undeniably true, as contended by Mr. McAllister, that there is a controversy which must be decided by the courts between the trust company and the water company. The trust company, under our law in Colorado, as I understand it, holds legal title to this property; the water

501 company only has an equity. The trust company is charged with certain duties under that trust deed given to it by the

water company. It is its duty to protect that trust. The trustees in the Dartmouth College case, who brought the suit, were not the college. The [charger] which had been granted by the Crown was not their contract. It is argued here that because this contract was between the water company and the town, that the trust company has no right to intervene and say what it ought to be, in the face of what the water company asserts. But the trust company has independent duties. It is liable on those duties to its bondholders. It brings this suit. It claims there was an election to purchase. The water company denies that; it claims there was no election. If it should be held in the end there was an election to purchase, it would certainly be adjudged that the contention of the water company cannot be sustained. If so adjudged, and the property is sold, it is the duty of the trust company to distribute the purchase price. I think as against the water company it has stated a cause of action. In addition to that the Trust Company has invoked the same jurisdictional grounds as to federal rights that the water company has invoked.

It has been argued by Governor Thomas and Mr. Waterman with much plausibility, that even though this writ go, the court would be powerless in the end to frame a decree saying what should be done; that inasmuch as the water company has not excluded the city from the right to construct its own plant, under ordinances 44 and 163 or both of them, that the court must in the end concede that the city has that right. Certainly that right will be conceded, if the contention of the defendant as to the meaning of this ordinance is true, when the city has complied with the terms of these contracts which it has entered into. The facts in the end may show that these contracts have been mutually rescinded. That is not a question raised here at all; that is as to ordinance 163. It may be shown that they have been abandoned. The facts do not sufficiently show to justify conclusion either way on that question at this time.

But inasmuch as it is the belief that section 264-A and the acts which are threatened in its execution impair the obligations of the rights of the cross-complainant as embodied in the contract ordinance 44 and ordinance 163, even if no further relief could ever be granted in this case, why is it not the duty of this court to say that it shall not proceed any further in the violation of the obligation of that contract?

But it is sufficient to say that at the final hearing those matters can then be determined fully. Being convinced at the present time that the bill and the cross-bill state jurisdiction in this
502 court, being convinced also for the purpose of this hearing that the threatened acts of the city impair the obligation of those contracts, nothing else need be solved, nor indeed need it be finally determined in this case as to the full meaning of section 264-A at this time, for the purpose, under all of the authorities, of entitling the complainant and the cross-complainant to the relief which they here seek.

There are many interesting questions that must arise in the final hearing of this case. Even if ordinance No. 44 in its terms does

not conclusively bind the city either to buy or to extend the contract, what is the effect of its acts since the appraisement? This appraisement was more than a year ago. It is alleged in the bill and in the cross-bill that since that time the situation between the water company and the city has proceeded as under the original agreement, ordinance 44. It is familiar law to all of us that a tenant whose term has expired who has a lease for a year, whose term is at an end, and yet who remains in and continues to pay monthly his rental, has thereby an acquiescence on the part of the landlord that his lease shall be renewed. These questions are only suggested at the present time; they have not been argued.

The complainant is therefore, under the view of the court, entitled to the relief prayed, and also the cross-complainant is entitled to the same relief; but these writs, as heretofore indicated, will not go against the election. I had not heard that question thoroughly argued until Governor Thomas spoke to the point, and I was glad to know that the authorities were in line with my previous views on the question. I have heretofore felt, in a like question, that the right to vote was a political right, and the attempt to enjoin it was an effort to extend the writ of the court into every home; that it would be somewhat of an encroachment upon the right guaranteed by the constitution, similarly to such a right whereby the people are permitted to assemble and petition at any time and on any subject they please.

It may be that in the end all of this section 264-A will have to go and all of this trouble and expense will be lost, but if the people want to vote, they have a right to vote and they have a right to pay for it. That does not encroach upon the rights of this complainant and cross-complainant. Section 264-A may be sustained even if the court is of the belief that it encroaches upon the rights of this complainant and this cross-complainant, in so far as it does not encroach upon those rights. There are many things in Section 264-A of a permanent character. This complainant and cross-complainant are not concerned with any of it except insofar as it en-
503 croaches upon their rights. It can be declared void insofar as it affects them, and remain for future determination as to its validity when other questions may arise under it.

The writ therefore may be framed, gentlemen, giving you the injunctive order as to everything except the holding of the election and the closing up of whatever the officials who have charge of the election are obligated under the law to do, paying the bills, ascertaining the results, and so forth. As to every other threatened act by the city officials named, by the Utilities Commission, you may have the temporary writ.

Mr. THOMAS: In connection with the order and in view of the fact that the city and other defendants except the water company will immediately appeal from the order under the acts of 1891, might I ask for an order requiring the parties to submit this appeal to the circuit court of appeals at the December term at St. Louis.

The COURT: I shall be very glad indeed if that can be done. I should be pleased to have you take the appeal from this order, and

if there is any way to aid you in getting it passed on promptly, I shall be glad to help you.

Mr. McALLISTER: In view of the statement of Governor Thomas that there is intention to appeal, I should like to have an order entered that the complainant in this case may have the benefit of the affidavits which were filed by the cross-complainant in connection with this hearing, I think under the law we are entitled to that.

Mr. THOMAS: There is no objection to that.

Mr. McALLISTER: We would like to have it made a part of complainant's case.

The COURT: The court will make that order.

Mr. THOMAS: I presume there will be no objection to our putting into the record a certified copy of the old case cited from the district court of Arapahoe County?

The COURT: You may by affidavit bring anything in you please on which you touched in your argument.

Mr. THOMAS: I understand that the order will be prepared and submitted to us so we can, if we find we can do so, have inserted a condition for the submission of the appeal as I have suggested?

The COURT: If there is anything the court can do to aid you in forcing it to an early hearing, I shall be glad to make the
504 order. I am not advised now as to any statute covering that feature.

Mr. THOMAS: I am not fully advised, either, if the court please.

The COURT: Possibly it will be governed exclusively by the rules of the court of appeals.

Mr. WATERMAN: I think it is pretty well settled that this case cannot be reviewed unless you make such an order a condition of the injunction, that they agree that it may be heard at St. Louis upon stipulation.

The COURT: I see no reason why that should not go into the order.

Mr. McALLISTER: I should say that it must be by agreement, and that is a matter we should want to consider a little before finally preparing the order.

Mr. THOMAS: I think all must concede that the final determination of that question is of the utmost importance to both sides. I can conceive of no reason why there should be any delay or why both sides should not be equally desirous of having it finally disposed of.

Mr. HUGHES: If your Honor please, if further affidavits are to be incorporated before the record will be concluded, I should like an opportunity, if they present anything which demands an answer, to file counter affidavits.

The COURT: Everything Governor Thomas argued and brought in here as a part of his argument he may incorporate in the record in the form of affidavits.

Mr. THOMAS: I read also from the circular signed by the company.

Mr. HUGHES: We can stipulate that may be made a part of the record.

Mr. THOMAS: That will be all.

Mr. MCALLISTER: When shall we submit this form of order?

The COURT: Whenever you are ready.

Mr. THOMAS: Your Honor has omitted the matter of bonds.

The COURT: Yes. How much do you suggest be the amount of the bond?

Mr. THOMAS: They ought to be very large, if the court please, because the injury to the city, as we feel, is apt to be very large in amount. For example, the duty of the Public Utilities
505 Commission, among other things, is to at once arrange to acquire a water system, consisting of water rights, rights of way, and so forth and so forth. These, in the nature of things—and I think perhaps the court may take judicial notice of the fact—are subject to constant rise in value. Values of water rights which may be acquired now as compared with those which might be acquired a year from now might be very large. The same is true in the fluctuations in the market value of pipe, and the value of lands for rights of way. As a consequence, I think the bond ought to be not less than $500,000.

The COURT: I should not anticipate any possibility of any such contingency as that.

Mr. THOMAS: It is not, in my judgment, imaginary. If you take the values of water rights, particularly as they have changed during the past eighteen months, and consider the influx of population, the pressure upon the water supply, which also affects the land and land values and the matter of rights of way, I do not think it is too much to say there may be a difference of that much.

The COURT: Your reference to this matter suggests another inquiry. Should the bonds be separate? I think the two writs should necessarily go.

Mr. THOMAS: We are not particular as to that, if the amounts are sufficient.

The COURT: They may give several bonds, to be approved by the clerk, in the sum of $100,000 each.

(Thereupon at 11:45 o'clock a. m., Monday, September 5, 1910, the hearing was concluded.)

Endorsed: No. 5572. Circuit Court of the United States, District of Colorado. The New York Trust Company vs. City and County of Denver, et al. Oral Opinion Delivered at Close of Argument on Application for Temporary Writ. Lewis, Judge. Filed Sep. 7, 1910. Charles W. Bishop, Clerk.

UNITED STATES OF AMERICA,
District of Colorado, ss:

I, Charles W. Bishop, clerk of the circuit court of the United States for the district of Colorado, do hereby certify the above and foregoing pages numbered from three hundred seventy four (374) to three hundred ninety five (395) both inclusive, to be a true, perfect, and complete transcript and copy of all opinions here-
506 tofore handed down and filed in said court and in a certain cause lately in said court pending wherein The New York

Trust Company was complainant and The City and County of Denver, Robert W. Speer as Mayor of the City and County of Denver, Burt F. Davis, as Clerk of said City and County of Denver, Albion K. Vickery as Auditor of said City and County of Denver; Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows as members of and constituting the Public Utilities Commission of said City and County of Denver; Ellis Meredith, A. E. Mauff and Harry Petrie as members of and constituting The Election Commission of said City and County of Denver, The Denver Union Water Company and The South Platte Canal and Reservoir Company were respondents, as fully and completely as the same still remains on file in my office at Denver.

In Testimony to the above, I do hereunto sign my name and affix the seal of said court, at the City and County of Denver, in said district this twenty-second day of September, A. D. 1910.

[Seal U. S. Circuit Court, Dist. of Colorado.]

CHARLES W. BISHOP, *Clerk.*

Vol. 2. Filed Sep. 24, 1910. John D. Jordan, Clerk.

507 (*Stipulation as to Record and Hearing of Cases in the Circuit Court of Appeals.*)

On the twenty-eighth day of September, A. D. 1910, a stipulation as to record and hearing of cases in Court of Appeals was filed in cases Nos. 3479 and 3480, in the words and figures following, towit:

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the Circuit Court of the United States in and for said District.

No. 5572. In Chancery.

THE NEW YORK TRUST COMPANY, Complainant,
vs.
THE CITY AND COUNTY OF DENVER et al., Defendants.

No. 5572. Cross-Bill.

THE DENVER UNION WATER COMPANY, Complainant,
vs.
THE CITY AND COUNTY OF DENVER et al., Defendants.

Appeals having been prayed and allowed to the City of Denver, Robert W. Speer, as Mayor of the City and County of Denver, Burt F. Davis, as Clerk of said City and County of Denver, Albion K. Vickery, as Auditor of said City and County of Denver, Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows, as Members of and Constituting the Public Utilities Commission of said City and County of Denver, Ellis Meredith, A. E. Mauff and Harry Petrie, as Members of and Constituting the Election Commission of

said City and County of Denver, from the orders of said
508 Court granting preliminary injunctions upon the bill and also upon the cross-bill of The Denver Union Water Company, heretofore filed in said cause, and orders of severance having been made, after due notice, granting appeals to said above named defendants,

It is therefore hereby stipulated and agreed, that one transcript or copy of the record in the above entitled cause may be used for both of said appeals, and the said two appeals may be conducted as one cause and heard together in the said Circuit Court of Appeals.

Dated at Denver, this 21st day of September, A. D. 1910.

JOEL F. VAILE,
HENRY McALLISTER, JR.,
WILLIAM N. VAILE,
GERALD HUGHES,
C. C. DORSEY,
W. V. HODGES,
A. M. STEVENSON,
For Cross-Complainants,
Attorneys for Complainants.
HENRY A. LINDSLEY,
GEO. Q. RICHMOND,
Sol'rs for City & County of Denver and Denver Officials, Defendants.
CHAS. W. WATERMAN,
CHARLES S. THOMAS,
Attorneys for Defendants The Public Utilities Commission and The Election Commission.

Endorsed: Nos. 3479 and 3480. In the United States Circuit Court of the District of Colorado. The New York Trust Company, Appellees, vs. The City and County of Denver, et al., Appellants. Stipulation as to record and hearing of cases in Court of Appeals. Filed Sep. 28, 1910, John D. Jordan, Clerk. Thomas, Bryant & Malburn, Attorneys for Defendants. 621-627 Ernest & Cranmer Bldg., Denver, Colo.

509 (*Appearance of Mr. Henry A. Lindsley and Mr. George Q. Richmond for Appellants in No.* 3479.)

And on the twenty-first day of November, A. D. 1910, the appearance of Mr. Henry A. Lindsley and Mr. George Q. Richmond, as counsel for appellants, in cause No. 3479, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3479.

THE CITY AND COUNTY OF DENVER et al., Appellants,
vs.
THE NEW YORK TRUST COMPANY et al.

The Clerk will enter *my* appearance as Counsel for the Appellants.

HENRY A. LINDSLEY.
GEO. Q. RICHMOND.

Endorsed: U. S. Circuit Court of Appeals, Eighth Circuit. No. 3479. The City and County of Denver, et al., Appellants, vs. The New York Trust Company, et al. Appearance. Filed Nov. 21, 1910, John D. Jordan, Clerk. Henry A. Lindsley, George Q. Richmond, Counsel for Appellants.

(*Appearance of Mr. A. M. Stevenson for Appellees in No.* 3479.)

And on the twenty-first day of November, A. D. 1910, the appearance of Mr. A. M. Stevenson, as counsel for appellees, in cause No. 3479, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3479.

THE CITY AND COUNTY OF DENVER et al., Appellants,
vs.
THE NEW YORK TRUST COMPANY et al.

The Clerk will enter my appearance as Counsel for the Ap-
510 pellees, The Denver Union Water Company, a corporation, and The South Platte Canal and Reservoir Company, a corporation.

A. M. STEVENSON,
615 *E. & C. Bldg., Denver, Colo.*

Endorsed: U. S. Circuit Court of Appeals, Eighth Circuit. No. 3479. The City and County of Denver, et al., Appellants, vs. The New York Trust Company, et al. Appearance. Filed Nov. 21, 1910, John D. Jordan, Clerk. A. M. Stevenson, Counsel for Appellees.

(*Appearance of Mr. Gerald Hughes for Certain Appellees in No.* 3479.)

And on the twenty-first day of November, A. D. 1910, the appearance of Mr. Gerald Hughes, as counsel for certain appellees, in cause No. 3479, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3479.

THE CITY AND COUNTY OF DENVER et al., Appellants,
vs.
THE NEW YORK TRUST COMPANY et al.

The Clerk will enter my appearance as Counsel for the Appellees, The Denver Union Water Company and The South Platte Canal and Reservoir Company.

GERALD HUGHES,
Hughes Block, Denver.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 3479. The City and County of Denver, et al., Appellants, vs. The New York Trust Company, et al. Appearance. Filed Nov. 21, 1910. John D. Jordan, Clerk. Gerald Hughes, Counsel for Appellees.

(Appearance of Messrs. Vaile, McAllister & Vaile for Appellee The New York Trust Co. in No. 3479.)

511 And on the twenty-first day of November, A. D. 1910, the appearance of Messrs. Vaile, McAllister & Vaile, as counsel for the appellee, The New York Trust Company, in cause No. 3479, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3479.

THE CITY AND COUNTY OF DENVER et al., Appellants,
vs.
THE NEW YORK TRUST COMPANY et al.

The Clerk will enter *my* appearance as Counsel for the appellees, The New York Trust Co.

JOEL F. VAILE.
HENRY McALLISTER, JR.
WILLIAM N. VAILE.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 3479. The City and County of Denver, et al., Appellants, vs. The New York Trust Company, et al. Appearance. Filed Nov. 21, 1910, John D. Jordan, Clerk. Joel F. Vaile, Henry McAllister, Jr., William N. Vaile, Counsel for Appellees.

(Appearance of Mr. Clayton C. Dorsey and Mr. William V. Hodges for Appellee The Denver Union Water Co. in No. 3479.)

And on the twenty-third day of November, A. D. 1910, the appearance of Mr. Clayton C. Dorsey and Mr. William V. Hodges, as

counsel for appellee, The Denver Union Water Co., in cause No. 3479, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3479.

THE CITY AND COUNTY OF DENVER et al., Appellants,
vs.
THE NEW YORK TRUST COMPANY et al.

The Clerk will enter *my* appearance as Counsel for the Appellees.

512 CLAYTON C. DORSEY,
WILLIAM V. HODGES,
Solicitors for The Denver Union Water Co.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 3479. The City and County of Denver, et al., Appellants, vs. The New York Trust Company, et al. Appearance. Filed Nov. 23, 1910, John D. Jordan, Clerk. Clayton C. Dorsey, William V. Hodges, Counsel for Appellees.

(*Appearance of Mr. Charles W. Waterman for Appellants in No.* 3479.)

And on the twenty-eighth day of November, A. D. 1910, the appearance of Mr. Charles W. Waterman, as Counsel for the appellants in Cause No. 3479, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3479.

THE CITY AND COUNTY OF DENVER et al., Appellants,
vs.
THE NEW YORK TRUST COMPANY et al.

The Clerk will enter my appearance as Counsel for the Appellants.
CHARLES W. WATERMAN.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 3479. The City and County of Denver, et al., Appellants, vs. The New York Trust Company, et al. Appearance. Filed Nov. 28, 1910, John D. Jordan, Clerk. Charles W. Waterman, Counsel for Appellants.

(*Appearance of Messrs. Thomas, Bryant, Nye, & Malburn for Appellants in No.* 3479.)

And on the twenty-eighth day of November, A. D. 1910, the appearance of Messrs, Thomas, Bryant, Nye and Malburn, as counsel

for the appellants in cause No. 3479, was filed in said cause, in the words and figures following, to-wit:

513 United States Circuit Court of Appeals, Eighth Circuit.

No. 3479.

THE CITY AND COUNTY OF DENVER et al., Appellants,
vs.
THE NEW YORK TRUST COMPANY et al.

The Clerk will enter *my* appearance as Counsel for the appellants.
C. S. THOMAS.
WM. H. BRYANT.
GEO. L. NYE.
WM. P. MALBURN.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 3479. The City and County of Denver, et al., Appellants, vs. The New York Trust Company, et al. Appearance. Filed Nov. 28, 1910, John D. Jordan, Clerk. C. S. Thomas, William H. Bryant, George L. Nye, William P. Malburn, Counsel for Appellants.

(*Order of Argument in Cause No.* 3479.)

And on the twenty-fourth day of January, A. D. 1911, in the record of proceedings of said Circuit Court of Appeals is an order of argument in cause No. 3479, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1910.

No. 3479.

THE CITY AND COUNTY OF DENVER, a Municipal Corporation, et al., Appellants,
vs.
THE NEW YORK TRUST COMPANY, a Corporation, et al.

Appeal from the Circuit Court of the United States for the District of Colorado.

TUESDAY, *January* 24, 1911.

This cause having been called for hearing in its regular order, the time for argument was enlarged to three hours on each side. Thereupon, argument was commenced by Mr. Charles S. Thomas in behalf of the appellants and continued by Mr. Henry McAllister, Jr. for the appellees, and the hour for adjournment having arrived, the further hearing of this cause was postponed until tomorrow morning.

514 (*Order of Submission in Cause No.* 3479.)

And on the twenty-fifth day of January, A. D. 1911, in the record of the proceedings of said Circuit Court of Appeals is an order of submission in cause No. 3479, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1910.

No. 3479.

THE CITY AND COUNTY OF DENVER, a Municipal Corporation, et al., Appellants,

vs.

THE NEW YORK TRUST COMPANY, a Corporation, et al.

Appeal from the Circuit Court of the United States for the District of Colorado.

WEDNESDAY, *January* 25, 1911.

This cause having been called this day for further hearing, argument was concluded by Mr. Charles W. Waterman for the appellants. Thereupon the cause was submitted to the Court upon the transcript of record from said Circuit Court and the briefs of counsel filed herein.

(*Opinion.*)

And on the nineteenth day of May, A. D. 1911, the opinion of said United States Circuit Court of Appeals was filed in causes Nos. 3479 and 3480, in the words and figures following, to-wit:

515 United States Circuit Court of Appeals, Eighth Circuit, May Term, A. D. 1911.

No. 3479.

THE CITY AND COUNTY OF DENVER, a Municipal Corporation, et al., Appellants,

vs.

THE NEW YORK TRUST COMPANY, a Corporation, et al., Appellees.

Appeal from the Circuit Court of the United States for the District of Colorado.

No. 3480, May Term, A. D. 1911.

THE CITY AND COUNTY OF DENVER, a Municipal Corporation, et al., Appellants,

vs.

THE DENVER UNION WATER COMPANY, a Corporation, et al., Appellees.

Appeal from the Circuit Court of the United States for the District of Colorado.

Mr. Charles S. Thomas and Mr. Charles W. Waterman (Mr. Henry A. Lindsley, City Attorney; Mr. George Q. Richmond, Mr. W. H.

Bryant, Mr. George L. Nye, Mr. William P. Malburn and Mr. William A. Jackson, were with them on the brief) for Appellants.

Mr. Henry McAllister, Jr., for New York Trust Co. (Mr. Joel F. Vaile, Mr. William N. Vaile, Messrs. Underwood, Van Vorst and Hoyt and Mr. J. Markham Marshall, were with them on the brief).

Mr. Gerald Hughes and Mr. Clayton C. Dorsey, for Denver Union Water Co. (Mr. William V. Hodges and Mr. A. M. Stevenson, were with them on the brief).

Before Hook, Circuit Judge, and Riner and Reed, District Judges.

HOOK, *Circuit Judge,* delivered the opinion of the court:

The New York Trust Company brought suit in the Circuit Court to enjoin the "City and County of Denver" in the State of Colorado and certain of its officers including the members of the Public Utilities Commission from issuing bonds and constructing a system of water works, for a decree that certain provisions of the municipal charter are in violation of the Constitution of the United States, for the specific performance of an alleged contract to purchase the
516 existing water works system, and for general relief. The Denver Union Water Company, which is the owner of the existing system of water works, and the South Platte Canal and Reservoir Company, a subsidiary corporation whose stock is owned by the Water Company, were made parties defendant. The Circuit Court granted orders of temporary injunction on complainant's bill and a cross bill of the Water Company. The case is here on appeal from those orders.

The complainant Trust Company and defendants the City and County of Denver and the Water Company are the successors respectively of other similar corporations from whose acts the present situation arises, but for the purposes of this case they may be regarded as original contracting parties in all respects. The Trust Company is a corporation of New York and is the trustee in a mortgage given by the Water Company to secure eight million dollars of its bonds. The mortgage embraces all the property, real and personal, of the Water Company, including franchises, contracts, rentals, choses in action and the right to receive the purchase price in case of sale to the municipality. The City and County of Denver, which for convenience will be called the city, is a municipal corporation of Colorado, and its officers and the members of the Public Utilities Commission are citizens of that State. The Water Company and the South Platte Company are Colorado corporations. The property of the latter, which consists principally of a valuable improved source of water supply, is an integral part of the water works system, is in the possession of and being operated by the Water Company, and is encumbered by a mortgage securing four million dollars of bonds subject to call. The cross bill of the Water Company sets forth substantially the same facts as contained in the original bill of the Trust Company but considers them to mean that the city elected, not to purchase its property as the Trust Company claims, but to renew its contract and franchise for an additional

period of twenty years. It also contains a prayer for relief similar to that of the original bill save that it asks that its right to a renewed contract and franchise be established. Applications for temporary injunction were submitted upon bill, cross bill and affidavits and the trial court entered orders on both pleadings temporarily enjoining the municipal defendants from issuing bonds and from taking any steps towards the construction of a water works plant, and, in case of the cross bill, from interfering with the Water Company in the continued exercise and enjoyment of its rights under its original franchise.

The appellants contend that the trial court was without jurisdiction of the suit and that the bill and cross bill are so manifestly without equity that temporary injunctions should not have been granted. Jurisdiction was invoked in the bill upon the ground of diversity of citizenship and also because the suit arose under the Constitution of the United States. As to the former, it is urged by the appellants that though the complainant, the Trust Company, is a citizen of New York and all the defendants are citizens of Colo-
517 rado, yet the defendant Water Company, which is an indispensable party, should for jurisdictional purposes be aligned with its mortgagee, the complainant, and when that is done the requisite diversity of citizenship does not exist. It is also claimed that the Trust Company in seeking the specific performance of an alleged contract of sale between the Water Company and the city, both citizens of Colorado, is suing for the contents of a chose in action and by the judiciary act it is therefore under the same disability in respect of jurisdiction as its assignor or mortgagor the Water Company. It may be assumed that these contentions as to diversity of citizenship and the lack of jurisdiction on that ground are well founded, yet if it appears from the face of the bill that a federal question is fairly presented there would still be jurisdiction in the Circuit Court. The Trust Company as the representative of the bond holders has certain rights independently of its mortgagor, the Water Company, and is not concluded by the action or non-action of the latter. Though possession, management and operation of the mortgaged property, with their usual incidents, remain with the Water Company, the derivative interest of the Trust Company is such as to entitle it to protection and to preserve the property pledged to it from unlawful injury or destruction; and if the wrong consists in legislation impairing the obligation of the mortgaged contracts and franchises it may invoke the jurisdiction of a circuit court of the United States regardless of the citizenship of its mortgagor. Mercantile Trust Co. v. Columbus, 203 U. S. 311.

When a case claimed to arise under the contract clause of the Constitution is presented it is necessary to determine whether there is a contract, what its true construction is, and whether as so construed the obligation is impaired by subsequent legislation of the State or under its authority. Of these matters in their order. There is no question but that a contract was entered into between the city and the Water Company. It is embodied in the ordinance of the city, No. 44, of the year 1890, which was duly accepted by the Water

Company, and by which it was granted the right to construct, maintain and operate a system of water works to such extent as the city might lawfully grant the same, subject to termination as therein provided. According to the terms of the ordinance have the contract relations between the parties expired by lapse of time? When the ordinance was adopted, April 10, 1890, the city was without power to grant the Water Company an exclusive franchise or one for a longer period than twenty years. It did, however, have power under the existing law to construct and operate water works of its own, and also then to bind itself by contract to purchase the plant belonging to the Water Company when the franchise of the latter expired. The contract to purchase, which it was within the power of the city to make, might have been an absolute one or upon such conditions or alternatives as were mutually satisfactory. So far there is little, if any, controversy and it may be concluded that the franchise of the water Company as originally granted expired April 10, 1910, twenty years after the adoption of the ordinance.

518 Briefly stated the contentions of the parties at this point of the case are as follows: The complainant Trust Company claims, and for that matter the Water Company also, that by the terms of the ordinance the city was bound at the end of the twenty year period either to purchase the water works system or to renew the contract with the Water Company for a like period but at a reduced hydrant rental. As already observed, the complainant and the Water Company differ as to the legal effect of what the city did under the alternatives stated. The former maintains the city elected to buy; the latter that it elected to renew the contract. On the other hand the city claims it was not obligated by the ordinance to do either and that it did neither.

When a water company assumes the duty of supplying a rapidly growing city and its inhabitants with water for a period of twenty years, necessarily involving the expenditure of large sums of money, it is but natural that some consideration would be given by the parties to the status of the company and its property at the end of the period. A business of that character cannot be conducted from hand to mouth like that of a green grocer, but provision for the public needs must be made many years in advance of actual demand, at least for an adequate water supply. There must be a large investment against future requirements. Especially is this so in a country like that in which Denver is situated where the problem is generally a difficult and expensive one. Nor is the investment ordinarily made at once for the entire time; on the contrary if the city grows as Denver did from 106,000 inhabitants in 1890 to double that number in 1910, the renewal of plant and extension of facilities for service and the like is measurably constant and continuous. Moreover, it is the common course as was the case here that the city retain the right upon its location of fire hydrants to demand of the Water Company the extension of mains and pipes into unserved districts or those newly populated, so that all within reason may receive the benefits. Much of the investment made under such conditions naturally remains unreturned at the end of the franchise

period. It would be a grievous burden upon the inhabitants of a city if a water company exacted such rates as would yield a reasonable return and in addition thereto such part of the investment as, at the end of the franchise term, would reduce it to the value of an idle plant. No community would tolerate such charges and in practice they are rarely if ever made. As was said by a hydraulic engineer selected by the city as an appraiser of the property in question: "To make a structure like Cheesman Lake 'pay out' in twenty years is unjust to the present generation of water takers." The lake referred to is a reservoir of a capacity of nearly twenty-six billion gallons which though owned by the subsidiary company is a part of the system of the Water Company. It is natural, therefore, to look for some treatment of the subject in the ordinance under consideration, and the parties point to sections 11, 12, 20 and 21. So far as need be quoted they are as follows:

"SEC. 11. At the expiration of the period of twenty years from and after the date of the passage and approval of the ordi-
519 nance, in case the city shall then elect so to do, the said works may be purchased by the said city, and in case the parties can not agree, after such election, upon the price to be paid by the city for the water works of the said company, its successors and assigns, then their fair cash value shall be determined by arbitration, by five disinterested persons, none of whom shall be residents of Denver, two of them to be chosen by the city, two by the company, and the fifth by the four first chosen, * * * and the decision of a majority of said board shall be final and binding upon both parties, and upon the payment, or tender of payment, by said city the said company shall convey to said city all of its property, real or personal, easements, rights and privileges, and thereafter all franchises, rights and privileges which have been at any time heretofore granted said company, its successors or assigns, and which it may then possess, shall cease and be at an end."

"SEC. 12. At the expiration of the said period of twenty years the said city may, at its election, renew the contract hereby made, by ordinance to that effect, for a like period of twenty years, but at a price for hydrant rental 10 per cent less than mentioned in Section 10 hereof, for the period remaining after the ten years after May 1st, 1891, and for successive periods of twenty years at the price last aforesaid, as often and as long as the city may choose. * * *"

Section 20 provided that all the apparatus owned by the water company and composing its plant, then or thereafter placed in or upon the streets, alleys and other public places in the city shall be and remain the sole and absolute property of the Water Company and it "shall forever be considered and entitled to be in possession thereof, except in case of purchase by said city under the terms of this ordinance, or some agreement between said city and said company, * * * when all rights of whatsoever nature of said company, * * * in and to the subject matter hereof shall vest in said city."

"SEC. 21. While the consideration for the respective agreements of the city and the company are upon each side the several agree-

ments of the other, all of the several grants, contracts and agreements in this ordinance contained are to be deemed independent agreements with the same force and effect as if each section of this ordinance was contained in a separate ordinance by itself."

First, as to Sections 11 and 12: For their operation they look to the expiration of the contract period twenty years in the future. Each of them purports to give the city a right of election, the former to purchase the water works at the agreed or appraised valuation and the latter to renew the contract with a reduced rate of hydrant rental. If the purpose was reasonably and fairly to conserve the rights of both parties and to encourage and assure the safety of a liberal investment by the Water Company essential to satisfactory service to the city and its inhabitants, they were related or connected alternatives, one or the other of which must be chosen. If Section 11 stood alone in the ordinance it would seem clear
520 that the city might do as it pleased, purchase or not purchase, whatever the circumstances. Though even in that case the provision for appraisal if the parties could not agree on the price would appear unnecessarily redundant, because the control of the situation would be almost entirely in the hands of the city. The Water Company, with its contract and franchise expired and no right to continue the use of the streets, would as a practical proposition be compelled to agree upon a price if the city was willing to buy. Without the vitality which comes from a franchise its property, designed for a special use, would have little value. Notwithstanding this, it was provided in Section 11 that the election of the city to buy should precede the attempt of the parties to agree on the price, and that if they could not then so agree there should be an appraisal by third persons which should be "final and binding upon both parties." There is at least a suggestion in the provision for election and appraisal that the right or power of the city in that particular was intended to be qualified by the contract in some way so as to make it forego the natural advantages of its position at the expiration of the franchise. Why was the right of election to renew the contract affirmatively reserved by Section 12 twenty years in advance of its expiration unless intended as an alternative of a purchase? The section was inserted in the ordinance for some substantial reason. Standing alone and disconnected from the preceding section it has little if any point when we consider the power the city already had under the law. As the law stood in 1890 the city could not then bind itself to renew, but the matter of renewal at the end of the franchise would be wholly within its control. There was no reason for making it the subject of contract with the Water Company, much less reserving a right of election with reference to it, unless it was intended to predicate some right of the Water Company upon it. But the parties went even further and stipulated that the renewal if made should carry with it a specified reduction in hydrant rental, and this fact adds to the significance of the presence of the section in the ordinance. The ordinary meaning of "elect" is to choose between alternatives, and having regard to the subject matter of the contract and the relation of the parties

it cannot well be said that there were two unrelated sets of alternatives of the city, namely: to purchase or not to purchase the water works under Section 11, and, independently thereof, to renew or not to renew the franchise under Section 12. The question is resolved more clearly and agreeably to reason by saying that each of the two sections contains a distinct proposition, one or the other of which must be adopted by the city, it having the choice. As already stated, the city could not in 1890 obligate itself to renew the contract in 1910, but having the power to own and operate a water works system of its own and to contract in advance for the purchase of that of the Water Company, it could lawfully have contracted to purchase if it did not renew. If the city having the power to renew did not exercise it, it should purchase. Section 20 of the ordinance does not throw much light on the question though it is in harmony with this conclusion. But Section 21, upon which the city relies, provides that the several contracts and agree-
521 ments in the ordinance shall be deemed independent with the same force and effect as if each section "was contained in a separate ordinance by itself," and the city contends that the above construction of Sections 11 and 12 is therefore inadmissible. That Section 21 was not intended to destroy all interrelation and dependency among the various parts of the ordinance is shown by its prefatory recital that the "consideration for the respective agreements of the city and the company are upon each side the several agreements of the other." There are other evidences to the same effect. For example, Section 12, which provides for a renewal of the contract refers specifically to Section 10 for the hydrant rentals that were to be reduced, and the concluding sentence of Section 12 provides that the section is conditioned "upon the full performance by the city of the provisions of Section 2 hereof," while Section 2 in turn refers to Section 1. Section 8 connects in necessary sense with Section 7 and also refers to the subsequent parts of the ordinance—and so on. Moreover, there is a general relation and connection of context and subject matter throughout the entire ordinance, and even if each section were a separate ordinance by itself they would still be read in pari materia as forming parts of a connected whole. Section 21 may reasonably be given due effect by construing it as intended to preserve the contract as a whole against the failure of some part of it in point of law. In this connection it may be noted that certain provisions of Section 5 as to water rates after the first five years were held by the Supreme Court of Colorado to be unenforceable. (Denver v. Water Co., 41 Colo. 77.)

This construction of the contract embodied in the ordinance of 1890 finds confirmation in the subsequent acts of the parties. In 1894 the city annexed the town of South Denver and thereby became the owner of a water system belonging to that municipality. Finding it was operating it at a loss an ordinance was adopted by the city December 15, 1894, and accepted by the Water Company, whereby the plant was leased to the company at an annual rental for the period ending April 10, 1910, which was the date of the expiration of the principal contract or franchise of 1890. This

ordinance required the Water Company to put in new construction for the better equipment and efficiency of the leased property, and provided that at the termination of the lease the city, if it elected to do so, might purchase the new construction at the appraised value thereof. But it was also provided, as in the principal ordinance, that the election to purchase should precede the appraisal. If the city concluded not to purchase the new construction then the Water Company was required to purchase what it had leased of the city, and in that event it was to receive a franchise upon the same terms as in the ordinance of 1890, the rates, restrictions and limitations to be as under the franchise elsewhere in the city. That ordinance is a complement of the one of 1890 to which it made express reference and was designed to secure a uniform status for the entire city, either municipal ownership of the property of the Water Company or private ownership under an extended franchise. It shows
522 quite clearly what the parties meant by Sections 11 and 12 of the older ordinance contract.

Before proceeding to the question whether the obligation of the contract between the city and the Water Company has been impaired by a subsequent law of the state or under its authority, reference may appropriately be made to an appraisal of the property of the Water Company including that controlled by it, under an ordinance adopted October 2, 1907. Pursuant to the terms of that ordinance five appraisers were selected in the manner specified in Section 11 of the ordinance of 1890, the city participating. They were disinterested hydraulic and civil engineers of national standing and reputation—one of Boston, Mass., one of Providence, R. I., two of New York City and one of St. Louis, Mo. After a thorough and exhaustive investigation covering about eighteen months they announced a valuation of approximately $14,000,000. It was contemplated by the ordinance under which the appraisal was had that alternative propositions of purchase of the property or renewal of the franchise at rates to be fixed by the board of appraisers should be submitted to the qualified voters of the city, but it was not done for a reason for which neither the city nor the Water Company was responsible, and because of this neither of them waived any of its rights under the original ordinance of 1890. The appraisal is referred to here chiefly for its light upon the value of the property involved. In this connection it should also be noted that the property, including that controlled as well as owned by the Water Company, stands as security for outstanding mortgage bonds aggregating $12,000,000, all of which, with $5,000,000 additional, it is alleged, was invested in the property upon the faith of the above construction of the contract of 1890 and with the knowledge and acquiescence of the city and its officers. It is also alleged that the contract of 1890 and its due observance constitutes in large measure the security for the bonds, all of which are in the hands of innocent purchasers for value.

The Constitution of Colorado of 1902 established the municipal corporation which is termed the city and provided for the election, by the electors thereof, of twenty-one tax payers to constitute a char-

ter convention to frame a charter for submission to the people for adoption. A charter was accordingly framed, and adopted in 1904. The Constitution also conferred upon the citizens of the city the exclusive power to amend the charter. In May, 1910, the month following the expiration of the Water Company's franchise of 1890, an amendment to the charter known as Section 264-*a* was adopted at an election. On July 6, 1910, ordinance No. 98 of that year's series was passed to carry out the terms of the charter amendment. It is contended by both the Trust Company and the Water Company that Section 264-*a* of the charter and the ordinance No. 98, both of which are laws within the meaning of the contract clause of the Constitution of the United States, impair the obligation of the contract between the company and the city, and are, therefore, void.

523 Obviously the safety of the large investment in the property and the value of the security for the mortgage bonds depend in great degree upon the performance by the city of its part of the contract. If the charter amendment fairly construed means that the city shall neither elect to purchase the property of the Water Company at the value to be agreed on or else fixed by appraisers, nor renew the contract upon the terms specified in Section 12 of the ordinance of 1890, it is void as impairing the obligation of a contract lawfully entered into, the duty to observe which still subsists. The charter amendment is in such case none the less void by reason of having its initiative in the electorate instead of in a representative legislative assembly. Such changes in the methods of making laws cannot impair or destroy the safeguards of the Constitution. The acts of the electors of a municipality in initiating and adopting local legislation are still laws of the state within the contract clause of the Constitution. While the state could not annul or render fruitless a lawfully executed contract nevertheless it might directly or indirectly determine the choice of the city between the contract alternatives, for the city as a subordinate governmental division is subject to its direction and control. For example, if a renewal of the contract alone were prohibited by a subsequent law or conditions for renewal prescribed which could not be complied with, an election to purchase would result from the exercise of the superior power of the state. But if the law said the city should do neither it would be void.

By Section 264-*a* a Public Utilities Commission was created and given entire control over the subject of water works and water supply. It was invested with all the powers of the city "granted in the constitution or named in the charter" with respect to constructing, purchasing, maintaining and operating a water plant. There were also the following provisions:

"Except as in this section provided, the city and county shall never purchase or acquire or exercise any option, right, privilege or power of purchasing or acquiring any water plant or system from any person, persons or corporation except upon a vote of the qualified electors first had and obtained authorizing the same, and wherever in any ordinance or contract the former City of Denver was

given the right, or the city and county now has the privilege or power to purchase or acquire any water system or plant or to extend any contract with reference thereto, the term "city" used in any such ordinance or contract shall be taken and held to mean the qualified electors of the city and county and not otherwise."

"Upon a vote of the taxpaying electors authorizing the same, as hereinafter provided, the City and County of Denver shall and it does hereby authorize the creation of an indebtedness in the sum of eight million dollars to provide a municipal water plant or system and everything incidental or necessary thereto for supplying the city and county and its inhabitants with water for all uses and purposes, said indebtedness to be evidenced by its bonds of the par value of eight million dollars, in convenient denominations of not more than one thousand dollars each and bearing four and
524 one half per centum interest per annum of such date and in such form and maturing at such times as may be prescribed by said commission. The council shall pass such ordinances as said commission may deem necessary respecting the issuance of said bonds or to the full exercise of all the powers given it, in the form recommended by the commission, and without amendment, and the mayor shall sign the same."

"If the Denver Union Water Company shall place in escrow with the Continental Trust Company of Denver, on or before July 1, 1910, a good and sufficient deed of conveyance from said water company to the City and County of Denver for all the property of every description included and embraced in the appraisement made under ordinance 163, series of 1907, free and clear of all liens, encumbrances, claims and demands of every kind and character, accompanied by a valid surrender and release of any and all rights, claims and demands said company or any of its subsidiary, associated or affiliated companies may have against the city and county or against any of said property, with direction in writing to deliver the same to said commission in exchange for seven million dollars of said bonds at par, then the commission shall file its acceptance with said trust company and the same shall constitute a binding contract of purchase."

"In case The Denver Union Water Company shall fail or refuse to fully comply with all the foregoing provisions as to the things to be done and performed by it, then at the special election aforesaid in lieu of the foregoing question, there shall be submitted to the qualified taxpaying electors on the ballot the question of issuing eight million dollars in bonds to be sold or used to construct and put into operation a complete system of water works for supplying said city and county and the inhabitants thereof with water for all uses and purposes."

"Such bonds, or so much thereof as the commission may deem necessary, shall be sold or used, by it to construct and put into operation a complete system of water works for supplying said city and county and its inhabitants with water for all uses and purposes, and said commission shall forthwith proceed to construct the same. The said commission shall, immediately upon its election, in case

The Denver Union Water Company has not accepted the seven million dollars in bonds for its plant as aforesaid, proceed to make a careful investigation of the value of said plant for the uses and purposes of the City and County of Denver and its inhabitants, and also proceed to make a careful estimate of the cost of constructing a complete new water system for the City and County of Denver and the inhabitants thereof and may submit an alternative bond proposition at said special election for the issuance of bonds in such sum as it may deem advisable for the acquisition or construction of a water plant or any part thereof by any of the ways within its powers herein mentioned."

The provision that if the Water Company did not accept the offer of $7,000,000 in bonds of the city the commission should
525 make an investigation of the value of the company's property and might submit at the election a proposition for the issuance of bonds "for the acquisition or construction of a water plant or any part thereof by any of the ways within its powers herein specified" includes the employment of the power of eminent domain. The ordinance of 1910 follows the lines of the charter amendment and need not be more particularly noticed save to say that it calls an election and provides for the submission of the various propositions mentioned in the charter amendment.

The Water Company did not deposit a conveyance of its property and accept the offer of $7,000,000 therefor, and it appears from supplemental pleadings filed after the temporary injunctions were granted that the special election was held and the proposition to issue $8,000,000 of city bonds "to be sold or used to construct and put into operation a complete system of water works for supplying said city and county and inhabitants thereof with water for all uses and purposes" was carried, it having received a majority of the votes cast thereon. Section 264-*a* and the supplemental ordinance constitute an attempted annulment of all obligation of the city under the ordinance of 1890; and the provisions for a bond issue for a municipal plant are an integral, inseparable part of the plan and purpose. The offer contained in the section of the charter of $7,000,000 for the property of the Water Company and the provision for the construction of a municipal plant in case the company refused to accept that sum constitute a distinct assertion that there will be no election to purchase according to the terms of Section 11 of the ordinance of 1890. That section required that the city elect to purchase before the matter of price or value should be entered upon. If after the election was made the parties could not agree, there was then to be an appraisal by five disinterested non-resident persons which should "be final and binding upon both parties." These provisions are important and substantial and the charter section is adverse to them. In effect that section declares that if the Water Company declines to accept the sum arbitrarily fixed the city shall then proceed to construct a plant of its own; and that means there shall be no purchase according to the contract.

There is also a clear conflict between the charter section and Section 12 of the ordinance of 1890. An express contract was embodied

in the ordinance that the Water Company should install hydrants upon its mains and supply them with water and that the city should accept the service and pay the company therefor a specified annual compensation. A renewal of the contract would necessarily embrace a continuance of hydrant service and compensation; but the charter section has a different plan in view. By Section 7 of the ordinance of 1890 the Water Company purchased from the city four hundred and ninety-three hydrants which the latter then owned and which were already installed, and the company agreed to replace them with hydrants of a different capacity. Within six months after the ordinance took effect the city was to designate the location of additional hydrants upon the water mains then in place,
526 sufficient to bring the number to one thousand, and the Water Company was to install them within a year. By Section 8 the Water Company agreed to supply with water the hydrants above mentioned and also those thereafter installed. By Section 13 provision was made for the extension of the existing water mains and the equipment of the extensions with hydrants, also for the payment of rental by the city as in the other cases. Section 10 provides that the city shall pay the Water Company as follows: "For the period of ten years from and after the 1st day of May, 1891, the sum of $35 per hydrant per annum for all hydrants then set and in operation, and for the remaining period until the right of purchase shall accrue, as mentioned in Section 11 hereof, the sum of $25 per hydrant per annum for all hydrants then set and in operation." It does not appear how many hydrants in addition to the thousand were installed upon the mains laid after the first year of the ordinance, nor how many were within the limits of South Denver or afterwards placed there, but it appears that the hydrant rentals were the principal if not the only compensation for the service rendered the city as a corporation. Such rentals are generally an important part of the income of a water company. Section 12 as already indicated provides for a renewal of "the contract hereby made, by ordinance to that effect, for a like period of twenty years but at a price for hydrant rental 10 per cent. less than that mentioned in Section 10"; that is to say, 10 per cent. less than the rate which prevailed at the expiration of the contract, April 10, 1910. An extension of the contract as provided by Section 12 would necessarily imply a continuation for twenty years of all the terms of the ordinance except as otherwise specified, and it would include an obligation on the part of the company to furnish the hydrants with water, and on the part of the city to pay the reduced rental for the same. But Section 264-*a* of the charter contemplates the construction and operation of "a complete system of water works for supplying said city and county and its inhabitants with water for all uses and purposes." This means that the city shall not contract to accept from the company the hydrant service and pay it annually the large sum for hydrant rental.

It is well settled that a contract not to compete will not be implied from the mere grant of a franchise to build and operate, but that rule does not apply to the case at bar. Here, the contract was

that when the twenty-year period expired, if the city did not by ordinance grant the company a renewal embracing an obligation on its part to accept hydrant service as before and pay for the same at the reduced rate, it would take over the entire business by buying the property. It is no answer to say that the city may buy one complete system of water works and also build another, or may renew a contract entailing the annual payment of a large sum for hydrant service and also build a system of its own "for all uses and purposes." It is impossible to believe such an unnecessary waste was intended or was what the electors voted for when they adopted the charter amendment. By fair construction Section 264-*a* seeks to free the city from both of the alternatives, from all obligation to the Water Company, and if judged by their acts that is the view adopted by its officers including the members of the Public Utilities Commission. Though the time is past there has been neither renewal by ordinance nor purchase. True, the Trust Company says the city elected to purchase and the Water Company says it elected to renew, but the facts are stated upon which these claims are based and it does not appear to us that the city has done either. Its position is in opposition to both claims and it is proceeding to put into effect the provisions of the law upon which it relies. The case as presented in the pleadings and affidavits seems to be well within the settled principles which determine the impairment of the obligation of contracts by subsequent legislation and the right to protection therefrom by appeal to a court of equity. Though the Water Company is still operating its plant, serving the city and its inhabitants, and receiving compensation, it is without acknowledged, established right to do so, and even the temporary privilege is threatened. It is entitled to more than a status resting between assertion and denial and is not required to wait until the injury has been fully inflicted. And the Trust Company has an equal standing to protect the rights of those it represents. Indeed the situation is one in which a determination of the rights of the parties is scarcely more important to those who have invoked the aid of the court than it is to the city which is about to incur a great indebtedness that might in part at least be avoided. Many other interesting questions were presented by counsel but we have followed what seems to be a plainly marked road through the controversy.

527

The orders are affirmed.

Filed May 19, 1911.

528 (*Decree in Cause No.* 3479.)

And on the nineteenth day of May A. D. 1911, in the record of the proceedings of said Circuit Court of Appeals, is a decree in cause No. 3479, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1911.

FRIDAY, *May* 19, 1911.

No. 3479.

THE CITY AND COUNTY OF DENVER, a Municipal Corporation; Robert W. Speer, as Mayor of the City and County of Denver; Burt F. Davis, as Clerk of said City and County of Denver; Albion K. Vickery, as Auditor of said City and County of Denver; Armour C. Anderson, Edwin Van Cise, and A. Lincoln Fellows, as Members of and Constituting the Public Utilities Commission of said City and County of Denver; Ellis Meredith, A. E. Mauff, and Harry Petrie, as Members of and Constituting the Election Commission of said City and County of Denver, Appellants,

vs.

THE NEW YORK TRUST COMPANY, a Corporation; THE DENVER Union Water Company, a Corporation, and The South Platte Canal and Reservoir Company, a Corporation.

Appeal from the Circuit Court of the United States for District of Colorado.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Colorado, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said Circuit Court, in this cause be, and the same is hereby, affirmed with costs; and that The New York Trust Company, a corporation, The Denver Union Water Company, a corporation, and the South Platte Canal and Reservoir Company, a corporation, have and recover against The City and County of Denver, a municipal corporation, Robert W.
529 Speer, as Mayor of the City and County of Denver, Burt F. Davis, as Clerk of said City and County of Denver, Albion K. Vickery, as Auditor of said City and County of Denver, Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows, as members of and constituting the Pubiic Utilities Commission of said City and County of Denver, Ellis Meredith, A. E. Mauff and Harry Petrie, as members of and constituting the Election Commission of said City and County of Denver, the sum of twenty dollars for their costs herein and have execution therefor.

May 19, 1911.

(*Petition for Rehearing in Causes Nos.* 3479 *and* 3480.)

And on the tenth day of July, A. D. 1911, a petition of appellants for a rehearing was filed in causes Nos. 3479 and 3480, in the words and figures following, to-wit:

530 In the United States Circuit Court of Appeals, Eighth Circuit.

No. 3479. Bill.

THE CITY AND COUNTY OF DENVER et al., Appellants,
vs.
THE NEW YORK TRUST COMPANY, Appellee,

and

No. 3480. Cross-Bill.

THE CITY AND COUNTY OF DENVER et al., Appellants,
vs.
THE DENVER UNION WATER COMPANY, Appellee.

Appeal from the Circuit Court of the United States for the District of Colorado on Preliminary Orders for Writs of Injunction.

Petition for Rehearing.

The appellants herein now come and respectfully pray this Honorable Court to grant them a rehearing in the above entitled
531 cause, for the following reasons:

1. The Court erred in holding that Sections 11 and 12 of the ordinance No. 44 of the City of Denver, Series of 1890, were alternative covenants, whose "contract was that when the twenty-year period expired, if the city did not by ordinance grant the company a renewal embracing an obligation on its part to accept hydrant service as before and pay for the same at the reduced rate it would take over the entire business by buying the proprty."

2. The Court erred in failing or refusing to hold the appellee Water Company to the performance of its covenants, and particularly those of Section 13 of said ordinance, as a condition to the enforcement of its terms against the appellant City and County.

3. The Court erred in holding that Section 264A of the Charter of the City and County impaired the obligation of the contract said to be embodied in Sections 11 and 12 of the said ordinance No. 44.

4. The Court erred in its opinion in various other respects apparent upon the face thereof.

I.

(*a*) The construction placed by this Honorable Court upon Sections 11 and 12 of ordinance 44, cannot be reconciled with kindred opinions of its own and of the Supreme Court of the United States, in cases of similar character. Nor is it in harmony with the language of the sections, the context of the ordinance, or the accepted canons of construction as applied to contracts. We shall refer briefly to some cases.

532 In construing grants of franchises, the Supreme Court has recently said:

"The rules of construction which have been adopted by courts in

cases of public grants of this nature by the authorities of cities are of long standing. It has been held that such grants should be in plain language, that they should be certain and definite in their nature and should contain no ambiguity in their terms. The legislative mind must be distinctly impressed with the unequivocal form of expression contained in the grant in order that the privileges may be intelligently granted or purposely withheld."

Cleveland Elec. Ry. Co. v. Cleveland, 204 U. S. 116-129.

The above merely amplifies "the established rule that public grants susceptible of two constructions must receive the one most favorable to the public."

Hamilton Gas Light Co. v. Hamilton, 146 U. S. 258-269.

The rule has also been stated as follows:

"One who asserts private rights in public property under grants of the character of those under consideration must, if he would establish them, come prepared to show that they have been conferred in plain terms; for nothing passes by the grant except it be clearly noted or necessarily implied. * * * It is enough to deny the privileges contended for if upon considering the act the
533 mind rests in doubt and uncertainty as to whether they are intended to be conferred."

Blair v. Chicago, 201 U. S. 400-463, 467.

As was said in Knoxville Water Co. v. Knoxville, 200 U. S. 22-33, citing Charles River Bridge v. Warren Bridge, 11 Pet. 420, "any ambiguity in the terms of such a contract 'must operate against the adventurers and in favor of the public,'" because "it is matter of common knowledge that grants of this character are usually prepared by those interested in them. * * * This is one among many reasons why they are to be strictly construed."

Blair v. Chicago, 201 U. S. 300-471.

And this is said to be a wise doctrine because "it seems to defeat any purpose concealed by the skillful use of terms to accomplish something not apparent on the face of the act, and thus sanctions only open dealing with legislative bodies."

Slidell v. Grandjean, 111 U. S. 412-438.

There is no ambiguity in the recitals of Sections 11 and 12. One gives the City the option to purchase at the end of twenty years if it so elects; the other the option to renew the franchise if it so elects. It may do either if it so elects, and this necessarily carries with it the right to reject both. This Honorable Court con-
534 cedes that Section 11 standing alone, imposes no obligation upon the City to purchase. It is equally clear that Section 12 standing alone, imposes no obligation upon the City to renew, and that Section 21 expressly declares each to be independent of the other. We are unable to reconcile these facts with the conclusion that because both are embodied in the ordinance, their combined effect is to impose an obligation upon the City to do one or the other. If it is correct, the old truism that things which are equal to the same thing are equal to each other, must be discarded. In its stead we

must erect the assertion that reservations which mean nothing when standing alone mean everything when associated in the same instrument, even though that instrument declares them in express terms to be independent of each other.

Conceding for argument's sake that these sections are capable of two constructions, the authorities quoted require the adoption of that one which is most favorable to the public. And this means that the City should prevail in its contention that it may do the one thing or the other, or neither if it so determines. And it should be noted that these sections only reserve rights or options to the City. Such is the decision of this Court in Water Company v. Aspen, 146 Fed. 8, in construing a section of an ordinance there involved, practically identical with Section 11 of ordinance 44. Nor does such a provision impose any requirement or duty to purchase.

Long v. Duluth, 49 Minn. 280.

Syracuse Water Co. v. Syracuse, 116 N. Y. 167-187.

535 Sec. 12 couched in similar phraseology should receive the same construction. And the authorities quoted were the law when this case was argued. This Honorable Court asks why the right of election to renew the contract was reserved unless intended as an alternative of purchase. It declares that when the contract was made the City was without power to then bind itself to renew, "but having the power to own and operate a water works system of its own, and to contract in advance for the purchase of that of the water company, it could lawfully have contracted to purchase if it did not renew. If the City having the power to renew did not exercise it, it should purchase," etc. Now if the City when the contract was executed could not directly bind itself to renew, it would seem that it could not do so by that indirect process which the court approves; for the law has heretofore very properly forbidden to municipalities the indirect exercise of a forbidden power. Yet if the opinion of this Honorable Court shall stand, all that it will hereafter be necessary for cities to do to avoid some ugly obstruction to their schemes, will be to reserve the right to do something within the scope of their authority, no matter what may be the nature of such reservation, or howsoever unfavorable to the cities, and if they conclude not to exercise such right, then ipso facto they are compelled to do the thing they are prohibited from doing. Of little avail will restrictions of power then become.

To the conclusion that these sections must be held to create some duty or be meaningless, we oppose what appears to be an obvious reflection that because a section creates no duty, it is not therefore meaningless. The City had the right to reserve one option
536 or two, or a dozen, without assuming a duty to observe any of them. Nor can this situation be changed because in one of its reservations it is stipulated that the charge for some particular service shall be changed either by an advance or a reduction. The court emphasizes the provisions of Sec. 20, which is proper. But if in fact and in law the City by reserving an option to buy and another option to renew, bound itself irrevocably to do one or the other, then Sec. 20 was wholly superfluous, since there was then no necessity of providing that the Company's pipes and equipment should remain

its property. That would follow as a matter of course. Such was a proper contention of the appellees.

But on the other hand, should the City refuse, as it might, either to buy or to renew, the Company would very naturally assume the necessity of such a covenant for the due protection of its interests, that none of its tangible property might be affected by any adverse construction of its common-law rights. Thus Section 20 performs a function if the other two sections reserve options merely. It is meaningless otherwise.

The very natural operation of this Honorable Court's construction of Sections 11 and 12, presents some features which are unique. They may have a bearing upon the soundness of its conclusion, especially if they tend to demonstrate the impracticability of its application to the su'bsequent course of the controversy. The decision is in terms that these sections contain alternative propositions, one or the other of which the City must adopt. But these propositions are of equal force if they are binding at all. If it does not purchase it must renew. If it does not renew it must purchase. The duty imposed by the two alternatives is an equal one. Neither is the primary obligation. The time of performance of both, and therefore of either, is the same. Whatever is done, must be done "at the end of twenty years." Neither before nor after that time can the City act, and if it does not act then, it cannot act at all. If it be said that the right or the duty to act is a continuous one, when does it cease? And how can this Honorable Court, or any other court in the country, compel the City, in an action for specific performance, or any other action, to exercise its discretion as to which of these things it will do, and failing to do anything, then decree either a purchase or a renewal? We can easily perceive the natural and practical consequences of a decree that by failing to elect to purchase on April 10th, 1910, the franchise was renewed ex vi termini, and the Water Company entitled to a decree accordingly. (No such conclusion, however, has yet been announced.) But to hold that the City must still elect between two alternatives and then go ahead, and that the courts will force such action upon it, is to impose a greater task upon the courts than upon the City, to frame a decree outlining such a course of procedure without doing violence either to the contract or to the discretionary powers of the City thereunder, or to both.

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In Clay Center v. L. & P. Co., 78 Kas. 390, 97 Pac. 377, where a statutory limitation existed similar to that here involved, forbidding the grant of a franchise for a longer period than twenty-one years, the ordinance provided that "if at the expiration of twenty-one years the city shall refused to grant a further continuance of these privileges, the city shall purchase," etc. the court held the agreement void, because the provision was an indirect attempt to evade a statutory limitation. The agreement there stated in express terms what this Honorable Court reads into the contract in the case at bar, but without avail.

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(*b*) The opinion of this Honorable Court is necessarily postulated upon the assumption that the City of Denver in 1890 had the

power to bind itself by contract to buy the plant of the Water Company twenty years thereafter. We can find no authority to support this assumption, and deny that it exists as a general municipal power. And there was no statutory warrant for its exercise. The Los Angeles and Kansas City cases cited by opposing counsel are not apposite. The cities there acted in each instance upon an express grant of legislative authority. We believe them to be the only cases involving the point. Neither of them support the view that the power exists independent of specific legislative authority.

With all respect we venture to affirm that no such extraordinary and far-reaching power in a municipality should be recognized unless conferred by the General Assembly, or by the Constitution, in unequivocal terms. If the City of Denver could bind itself absolutely to purchase a water plant twenty years hence, it can
539 bind itself to pay twice or ten times its value. It can tie the hands of all succeeding and intervening councils. It can agree to take all extensions, and improvements, together with antiquated or outworn equipment and useless appurtenances. It can make similar contracts with light companies, traction companies and telephone companies. It can by this means disregard such limitations as existed in the Denver Charter, upon the power to contract debt in advance of appropriations made therefor. Indeed it becomes possible through the existence of such a power to mortgage another generation by scores of contracts of purchase and without reference to the public needs.

And if such a power exists why limit its exercise to twenty years? No reason is perceived for this. The City might with equal power and propriety have agreed to purchase fifty or a hundred years after date, and because it has power to do so, have also agreed to renew the franchise from time to time until the day of payment arrived. Judge Dillon told us long ago that councils could not conclude their successors by actions such as this nor exceed the charter limitations upon expenditures, or exercise any authority not specifically imposed or necessarily implied for the requirements of municipal government. The reasons he gave for these fundamental propositions seem quite as convincing in this twentieth century as they did thirty years ago. The authority to make such a contract did not exist, and we trust it never will be conferred. The foundation of the court's opinion is of sand, for the assumption finds support upon no principle or decision we have been able to discover.

540 If it be true that our municipalities may contract to purchase an extensive water system twenty years after date thereof, and may utilize the power to neutralize a charter prohibition against the grant of a franchise for a longer period, then they are clothed with an authority most dangerous and menacing to the public welfare. This doctrine must undo what years of judicial decisions have accomplished for the emancipation of cities from venal councils controlled by more venal public utility corporations. Did no other reason exist to challenge its soundness, the enormity of the abuses to which its exercise is susceptible would be sufficient.

It is true that there are cases upholding the power of a City to con-

tract for a water supply for twenty years at an annual rental on the ground that such contract is the exercise of the business power of the City, as distinguished from its governmental powers, and hence is no limitation on those governmental powers. But the Supreme Court of the United States does not recognize this distinction when it comes to a limitation on the City's power to acquire its own plant, and the Water Company's contention presents a different case, and is one more like, and indeed practically identical with, so far as its effect on the limitation of a city's powers is concerned, the grant of an exclusive franchise.

The Water Company's position amounts to an allegation of a restriction on the City's power to provide itself with a water supply by limiting such supply to one particular plant. The grant of the power to limit itself in this respect and the exercise of the
541 power must both appear expressly or by necessary implication.

At least this is the rule laid down in Los Angeles v. Los Angeles Water Co., 177 U. S. 558, and Freeport Water Co. v. Freeport, 180 U. S. 587, in regard to contracting away the right to regulate rates, and a fortiori it must be the rule where the question of acquisition of a water works system arises. Needless to say no such grant of power to the City to so limit itself appears in the Constitution of Colorado, the statutes, or the charter of the City, either expressly or by necessary implication.

In Joplin v. Light Co., 191 U. S. 150, the court said that "the limitation contended for (on the city's right to supply itself with an electric light plant) is upon a governmental agency," so we believe it follows that while making a contract for a supply of water for a period of years may be the exercise of the business power of the City, yet the power to supply itself and its inhabitants with water is a governmental power, "and restraints upon that must not be readily implied." (Joplin case, p. 156.)

The case of Knoxville Water Co. v. Knoxville, 200 U. S. 22, holds that the power to supply itself with a water supply is conferred upon the City solely for the public good. Where it is claimed, as here, that the City has absolutely bound itself to purchase the Water Company's plant, or to renew its franchise, to the exclusion of any other method of acquiring a water supply, the case becomes identical in principle with the Knoxville case, and should be similarly decided.

542 (*c*) The decision informs us that its construction of the contract finds confirmation in the subsequent acts of the parties, and the ordinance of 1894, concerning the *the* South Denver plant, is cited in confirmation. But the fact that the Water Company never acted nor offered to act upon the court's construction of that ordinance is not even alluded to. It placed no such emphasis upon the provisions of this lease until its proposed new franchise was rejected in May, 1910, up to which time, as the record shows, it acted entirely upon the assumption that the options in Ordinance 44 were options only, and that the ordinance expired on April 10, 1910. The recitals in the preamble, as well as in the body

of Ordinance 163, the circulars and literature of the Company in the campaign preceding the last election, in its successful resistance to the City's attempt to enforce the provisions of Sec. 5 concerning rates, and in its general line of conduct with relation to its rights and duties, all conclude the Company against its present contention. And surely its disregard of the provisions of the ordinance of 1894 and its utter failure so much as to offer to make its provisions effective should outweigh and overwhelm its eleventh hour construction of that ordinance, resurrected as a last resort to enable it to continue its strangle hold upon the City and its inhabitants. Had the Company offered to purchase, had it not made it impossible by destroying Sec. 5 to receive a franchise as upon the same terms as in the ordinance of 1890, and had the ordinance of 1894 embodied any other subject than the South Denver water plant, or indeed had there been "a uniform status for the entire city," which was
543 and is not the case, the recitals might have been of some importance. As it is, the covenants of that contract are not even persuasive.

While the lease granted in the ordinance of 1894 expired at the same date as the Water Company's franchise, yet it is notable that the disposition of the property is not controlled by the action of the City under the ordinance of 1890. The City might purchase under the ordinance of 1890 the property of the Water Company, and the Water Company at the same time might be compelled to purchase the South Denver plant under the ordinance of 1894. If the purpose of this ordinance had been what this Court implies, this contingency would not have been permitted to arise.

The ordinance of 1894 is chiefly valuable as demonstrating the ability of the Water Company to draft a contract which provides that in case one proposition is not accepted the other shall be. The words are clear and unambiguous:

"In the event of the City of Denver concluding not to purchase such new construction then the Denver Union Water Company, its successors and assigns, shall purchase the pipes and mains of the City of Denver," etc.

But further: If this ordinance throws any light on the original ordinance of 1890, the same light is thrown by the ordinance of 1907, accepted by the Water Company before the expiration of the franchise of 1890 or the lease granted in the ordinance of 1894. If the Company and the City may be presumed to have con-
544 tracted in 1894 with full knowledge of their respective rights, so must they be presumed to have constracted in 1907. By the ordinance of 1907 the taxpayers of the City were to vote whether they should purchase or renew or do neither, and due provision is made in case voters "shall refuse to accept either the proposition as to the purchase of said property or as to the granting of a new contract."

The consideration for the ordinance of 1907 is not the substitution of the right of the City to reject either proposition for the right to reject one only but merely the substitution of the right of the City to have an appraisement of the value of the property before making

an election as to whether it would purchase or not instead of the right to elect before the appraisement was made. This construction we maintain is the only possible one to give the ordinance of 1907. Can it be that the ordinance of 1907, which purported to make certain changes in the contract between the City and the Company, entirely modified the most important feature thereof, i. e., the compulsory purchase or renewal, without referring to such modification, while every other change was expressly pointed out? Such a conclusion is at variance with the canons of construction applied by the courts everywhere.

(*d*) If Section 12 of Ordinance 44 is effective and binding because the City did not elect to purchase, and if Section 12, otherwise ultra vires, is vitalized by reserving the option to purchase in Section 11, it follows that Section 12 must operate in its entirety. And it provides not only for renewal for "a like period of twenty
545 years," but for "successive periods of twenty years at the price aforesaid as often and as long as the city may choose." The necessary and unavoidable result of the reasoning of this Honorable Court must be that the City was bound at its peril to elect to buy on April 10th, 1910, or to renew the franchise for twenty years, and for successive periods ad infinitum. It "chooses" by refusing to buy. The choice is Hobson's, but it is none the less effective. Every reason urged by the court to support its conclusion as to the immediate renewal applies with equal force to succeeding ones, for there is no continuing "alternative" option to buy. That option has performed its office by giving life to Section 12 and to all of it, through the failure of the City to take over the plant under the terms of Section 11, on April 10th, 1910.

We are unable to perceive the logic which would confine the court's decision to one renewal only, and leave it optional with the City thereafter to renew only, and leaves it optional with the City thereafter to renew or not as it might "choose." Lexicographers tell us that when we choose we elect, and vice versa. If by "election" is meant that the City must act affirmatively, then by "choice" it must do likewise. If because it had the power to bind itself to a purchase twenty years hence, it could by reserving a right of election to do so bind itself in case of failure to renew the franchise once, then because of the same power and by the same processes it can bind itself to renew the franchise again and again. The Water Company practically makes this claim on pages 257-8 of
546 its brief. Did this Honorable Court give due weight to this clause of Section 12 in formulating its decision? We cannot believe that it did.

II.

An individual invoking the aid of a court of equity to enforce a contract, must aver and prove performance or excuse for failure, coupled with readiness to perform upon his part. He must do equity. This proposition is an axiom. There can be no reason for exempting a corporation from its operation, or denying to a munici-

pality the right to plead and prove the fact of non-performance if it be so. But such is the effect of this Honorable Court's decision. The record shows without dispute the Company's continuous and systematic disregard and violation of the requirements of Section 13, which, as the Court says of Section 12, "must have been inserted for some substantial reason." The Court also as to this subject declares that "an express contract was embodied in the ordinance that the Water Company should install hydrants upon its mains and supply them with water, and that the City should accept the service and pay the Company a specified annual compensation. A renewal of the contract would necessarily embrace a continuance of hydrant service and compensation; but the charter section has a different plan in view." Thereafter the decision refers to Section 13 as a part of the contract which was impaired by the charter amendment, thus emphasizing the important part which Section 13 plays in the ordinance. Yet the decision is wholly silent as to the effect of its constant and wilful violation year after year by the Company, either as affecting its right to specific perform-
547 ance or the right of the City to treat it as a breach of the agreement. If the books contain a decision in favor of the complainant in a bill for specific performance who has disregarded so serious and very important a covenant of his agreement without lawful excuse, we have been unable to find it. And we submit that no more grave or far-reaching covenant can be found in the contract than the provision of Section 13. The Company can give service to all the City only by extending its mains as the City grows. It can give fire protection to all the City only by erecting its hydrants in every part thereof and as required to do so from time to time by the City Council. If it can neglect or refuse to do this for any reason and then enforce the other provisions of the agreement against the City, then indeed do the courts become instruments for the enforcement of injustice and wrong. We cannot believe that such was the purpose of this Honorable Court, albeit this is the necessary consequence of its decision.

In the recent case of Columbus v. Trust Company, 218 U. S. 645, the Supreme Court emphasizes the duty of a water company to furnish a wholesome and sufficient supply of water at all times. To do it at intervals is not sufficient. No excuse will or can be accepted for failure, and the City by virtue of its police power must do it if the company does not. The same duty requires the extension of mains and the erection of hydrants as the contract requires, for without them large portions of the community go without whole-
some or any other quality of water, and without fire protec-
548 tion. This gross, unwarrantable and reckless disregard of its covenants, of its duties, of the health and necessities of the public, and of the perils of fire, cannot be too severely reprehended. Yet the company escapes without a reference to the subject and notwithstanding its palpable derelictions, prevails in its preliminary skirmish to fasten itself upon the community forever.

III.

The court expressly says that the contract by its terms provided "that when the twenty year period expired, if the City did not by ordinance grant the Company a renewal embracing an obligation on its part to accept hydrant service as before and pay for the same at the reduced rate, it would take over the entire business by buying the property, * * * and it does not appear to us that the City has done either." It follows that on the 11th day of April, A. D. 1910, the City's breach of its contract was complete, or else by failing to purchase it automatically elected to renew. In either event the City's breach occurred and the Company's right of action accrued on that day. No subsequent legislation can alter this fact.

On May 17th, 1910, thirty-seven days afterwards, the people enacted Section 264A of the charter, which this Honorable Court declares to be an impairment of the contract and therefore a violation of the Constitution of the United States. That is to say, a contract theretofore repudiated, thereby investing the injured party with the right of instant appeal to the courts, has been impaired by a charter amendment enacted some time thereafter. If this
549 is a correct exposition of the law, it follows that a contract can be impaired by legislation enacted at any time within the period of the statute of limitations after breach thereof, without regard to the right of the injured party to invoke the aid of the courts for his protection.

The liability of the City, if any, was absolute when it refused to perform. No subsequent act could thereafter impair the obligation of the contract thus broken. It might attempt to escape liability, but that was fixed in the one or the other direction on the 11th day of April, A. D. 1910.

The Supreme Court in Dawson v. Columbia Trust Company, 197 U. S. 178-181, said:

"The bill presents a naked case of breach of contract. The first step of the City was to repudiate the contract and refuse to pay. Whatever it may have done subsequently, its wrong, if there was a wrong, was complete then."

And in St. Paul Gas Light Co. v. St. Paul, 181 U. S. 142-9, the same court, referring to an ordinance enacted subsequent to the breach, and there asserted to be an impairment of the contract, said of the ordinance:

"It was but a denial by the City of its obligation to pay and a notice of its purpose to challenge in the future the existence of the duty to make such payment. This denial, whilst embodied in an ordinance, was no more efficacious than if it had been expressed in any other form, such as by way of answer filed on behalf of
550 the City in a suit brought by the Company against the City to enforce what it conceived to be its rights under the contract."

Suppose Section 264A had not been adopted, but the council had by ordinance enacted that it would neither buy nor renew, or that

it would construct a plant of its own, or attempted to grant a franchise to some one else, or the City had contented itself by answer denying the obligation of the contract, or had done nothing at all. Must there not in the judgment of this Court have been just as much of an impairment of the contract obligation as the amendment of the charter more than a month after the agreement was broken?

This court, speaking through his Honor Judge Riner, in Sioux Falls v. Trust Company, 136 Fed. 721, said that when in a suit to restrain a City from constructing and operating its own water works, complainant's rights were acquired under a municipal contract, and not by virtue of any constitutional or statutory provision, complainant was not entitled to the independent judgment of the Federal Court on the construction of a constitutional provision or the statute of the State with reference to the power of the City to increase its indebtedness for the purpose of constructing such works.

This was good law for Sioux Falls. It should be equally good for Denver. The Company's claim is founded here as it was there upon a municipal contract. It should be denied the right, as was the complainant in that case, to invoke the judgment of this court
551 as to the construction of Section 264A of the Charter.

The decision of this Honorable Court is erroneous upon each of the three fundamental propositions herein discussed, and to which we have confined our petition, without prejudice to the presentation of others as the case proceeds. It is inconsistent, we respectfully assert, with the doctrines of the decisions and authorities cited, and out of harmony with all rules relating to the construction of contracts. There is no federal question in the record, no existing contract between the parties, no act impairing its obligation. Those complaining of the City are alone guilty of its violation when the contract was in force. Wherefore they have, or at least should have, no standing whatever in this Honorable Court. We therefore respectfully pray that an order be entered granting the appellants a rehearing of this appeal.

HENRY A. LINDSLEY,
CHARLES S. THOMAS,
CHARLES W. WATERMAN,
Solicitors for Appellants.

WM. H. BRYANT,
GEO. L. NYE,
WM. P. MALBURN,
GEO. Q. RICHMOND,
WM. A. JACKSON,
Of Counsel.

I hereby certify that in my opinion the foregoing petition for rehearing is well founded in law and in equity.

CHARLES S. THOMAS.

(Endorsed:) Filed Jul- 10, 1911, John D. Jordan, Clerk.

552 (*Order Denying Petition of Appellants for a Rehearing in Cause No.* 3479.)

And on the sixteenth day of October, A. D. 1911, in the record of the proceedings of said Circuit Court of Appeals is an order denying the petition of appellants for a rehearing in Cause No. 3479, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, September Term, 1911.

MONDAY, *October* 16, 1911.

No. 3479.

THE CITY AND COUNTY OF DENVER, a Municipal Corporation, et al., Appellants,
vs.
THE NEW YORK TRUST COMPANY, a Corporation, et al.

Appeal from the Circuit Court of the United States for the District of Colorado.

This cause came on this day to be heard upon the petition for a rehearing, filed by counsel for appellants.

On consideration whereof, it is now here ordered by this Court, that said petition for a rehearing of this cause, be, and the same is hereby, denied.

October 16, 1911.

553 (*Appearance of Messrs. Thomas, Bryant, Nye & Malburn for Appellants in Cause No.* 3480.)

And on the twenty-first day of November, A. D. 1910, the appearance of Messrs. Thomas, Bryant, Nye & Malburn, as counsel for appellants in cause No. 3480, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3480.

THE CITY AND COUNTY OF DENVER et al., Appellants,
vs.
THE DENVER UNION WATER COMPANY et al.

The Clerk will enter *my* appearance as Counsel for the Appellants.

CHAS. S. THOMAS.
WM. H. BRYANT.
GEO. L. NYE.
WM. P. MALBURN.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 3480, The City and County of Denver et al., Appellants, vs. The Denver Union Water Company et al. Appearance. Filed Nov. 21, 1910, John D. Jordan, Clerk, Charles S. Thomas, William H. Bryant, George L. Nye, William P. Malburn, Counsel for Appellants.

(*Appearance of Messrs. Vaile, McAllister & Vaile for Appellee, The New York Trust Company, in Cause No.* 3480.)

And on the twenty-first day of November, A. D. 1910, the appearance of Messrs. Vaile, McAllister & Vaile, as counsel for appellee, The New York Trust Company, in cause No. 3480, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3480.

THE CITY AND COUNTY OF DENVER et al., Appellants,
vs.
THE DENVER UNION WATER COMPANY et al.

554 The Clerk will enter *my* appearance as Counsel for the Appellee, The New York Trust Company.

JOEL F. VAILE.
HENRY McALLISTER, Jr.
WILLIAM N. VAILE.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 3480. The City and County of Denver et al., Appellants vs. The Denver Union Water Co. et al. Appearance. Filed Nov. 21, 1910, John D. Jordan, Clerk. Joel F. Vaile, Henry McAllister, Jr., William N. Vaile, Counsel for Appellees.

(*Appearance of Mr. A. M. Stevenson as Counsel for Certain Appellees in Cause No.* 3480.)

And on the twenty-first day of November, A. D. 1910, the appearance of Mr. A. M. Stevenson, as counsel for certain of the appellees in cause No. 3480, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3480.

THE CITY AND COUNTY OF DENVER et al., Appellants,
vs.
THE DENVER UNION WATER COMPANY et al.

The Clerk will enter my appearance as Counsel for the Appellees, The Denver Union Water Co., a Corporation, and The South Platte Canal and Reservoir Company, a Corporation.

A. M. STEVENSON,
615 *E. & C. Bldg., Denver, Colo.*

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 3480. The City & County of Denver et al., Appellants, vs. The Denver Union Water Company et al. Appearance. Filed Nov. 21, 1910. John D. Jordan, Clerk. A. M. Stevenson, Counsel for Appellees.

555 (*Appearance of Mr. Gerald Hughes as Counsel for Certain Appellees in Cause No.* 3480.)

And on the twenty-first day of November, A. D. 1910, the appearance of Mr. Gerald Hughes, as counsel for certain of the appellees in cause No. 3480, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3480.

THE CITY AND COUNTY OF DENVER et al., Appellants,
vs.
THE DENVER UNION WATER COMPANY et al.

The Clerk will enter my appearance as Counsel for the Appellees, The Denver Union Water Company and The South Platte Canal and Reservoir Company.

GERALD HUGHES,
Hughes' Block, Denver.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 3480. The City and County of Denver et al., Appellants, vs. The Denver Union Water Company et al. Appearance. Filed Nov. 21, 1910, John D. Jordan, Clerk. Gerald Hughes, Counsel for Appellees.

(*Appearance of Mr. Henry A. Lindsley and Mr. George Q. Richmond as Counsel for Appellants in Cause No.* 3480.)

And on the twenty-first day of November, A. D. 1910, the appearance of Mr. Henry A. Lindsley and Mr. George Q. Richmond, as counsel for appellants in cause No. 3480, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3480.

THE CITY AND COUNTY OF DENVER et al., Appellants,
vs.
THE DENVER UNION WATER COMPANY et al.

556 The Clerk will enter my appearance as Counsel for the Appellants.

HENRY A. LINDSLEY.
GEO. Q. RICHMOND.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 3480. The City and County of Denver et al., Appellants, vs. The Denver Union Water Company et al. Appearance. Filed Nov. 21, 1910, John D. Jordan, Clerk. Henry A. Lindsley, George Q. Richmond, Counsel for Appellants.

(*Appearance of Mr. C. C. Dorsey and Mr. W. V. Hodges as Counsel for Appellee, Denver Union Water Company in Cause No.* 3480).

And on the twenty-third day of November, A. D. 1910, the appearance of Mr. C. C. Dorsey and Mr. W. V. Hodges, as counsel for the appellee, Denver Union Water Company, was filed in Cause No. 3480, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3480.

THE CITY AND COUNTY OF DENVER et al., Appellants,
vs.
THE DENVER UNION WATER COMPANY et al.

The Clerk will enter *my* appearance as Counsel for the Appellees.

C. C. DORSEY,
W. V. HODGES,
For Denver Union Water Co.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 3480. The City and County of Denver et al., Appellants, vs. The Denver Union Water Company et al. Appearance. Filed Nov. 23, 1910, John D. Jordan, Clerk. C. C. Dorsey, W. V. Hodges, Counsel for Appellees.

(*Appearance of Mr. Charles W. Waterman as Counsel for Appellants in Cause No.* 3480.)

And on the twenty-eighth day of November, A. D. 1910, the appearance of Mr. Charles W. Waterman, as counsel for appel-
557 lants in cause No. 3480, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3480.

THE CITY AND COUNTY OF DENVER et al., Appellants,
vs.
THE DENVER UNION WATER COMPANY et al.

The Clerk will enter my appearance as Counsel for the Appellants.

CHARLES W. WATERMAN.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 3480. The City and County of Denver et al., Appellants, vs. The Denver Union Water Co. et al. Appearance. Filed Nov. 28, 1910. John D. Jordan, Clerk. Charles W. Waterman, Counsel for Appellants.

(*Order of Argument in Cause No.* 3480.)

And on the twenty-fourth day of January, A. D. 1911, in the record of the proceedings of said Circuit Court of Appeals is an order of argument in cause No. 3480, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1910.

No. 3480.

THE CITY AND COUNTY OF DENVER, a Municipal Corporation, et al., Appellants,
vs.
THE DENVER UNION WATER COMPANY, a Corporation, et al.

Appeal from the Circuit Court of the United States for the District of Colorado.

TUESDAY, *January* 24, 1911.

This cause having been called for hearing in its regular order, argument was commenced by Mr. C. S. Thomas for the appellants and continued by Mr. Gerald Hughes for the appellees, but
558 the hour for adjournment having arrived before the conclusion thereof, the further hearing of this cause was postponed until tomorrow morning.

(*Order of Submission in Cause No.* 3480.)

And on the twenty-fifth day of January, A. D. 1911, in the record of the proceedings of said Circuit Court of Appeals is an order of submission in cause No. 3480, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1910.

No. 3480.

THE CITY AND COUNTY OF DENVER, a Municipal Corporation, et al., Appellants,
vs.
THE DENVER UNION WATER COMPANY, a Corporation, et al.

Appeal from the Circuit Court of the United States for the District of Colorado.

WEDNESDAY, *January* 25, 1911.

This cause having been called this day for further hearing, argument was continued by Mr. Gerald Hughes and Mr. C. C. Dorsey

for the appellees, and concluded by Mr. Charles W. Waterman for the appellants.

Thereupon the cause was submitted to the Court upon the transcript of record from said Circuit Court and the briefs of counsel filed herein.

(*Opinion.*)

And on the nineteenth day of May, A. D. 1911, the opinion of the United States Circuit Court of Appeals was filed in cause No. 3480, which said opinion is omitted at this point for the reason that a copy thereof appears at page 515 et seq. of this transcript.

559 (*Decree in Cause No.* 3480):

And on the nineteenth day of May, A. D. 1911, in the record of the proceedings of said Circuit Court of Appeals for the Eighth Circuit is a decree in cause No. 3480, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1911.

No. 3480.

THE CITY AND COUNTY OF DENVER, a Municipal Corporation; Robert W. Speer, as Mayor of the City and County of Denver; Burt F. Davis, as Clerk of said City and County of Denver; Albion K. Vickery, as Auditor of said City and County of Denver; Armour C. Anderson, Edwin Van Cise, and A. Lincoln Fellows, as Members of and Constituting the Public Utilities Commission of said City and County of Denver; Ellis Meredith, A. E. Mauff, and *and* Harry Petrie, as Members of and Constituting the Election Commission of said City and County of Denver, Appellants,

vs.

THE DENVER UNION WATER COMPANY, a Corporation, and THE NEW YORK TRUST COMPANY, a Corporation.

Appeal from the Circuit Court of the United States for the District of Colorado.

FRIDAY, *May* 19, 1911.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Colorado, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said Circuit Court, in this cause, be, and the same is hereby, affirmed with costs; and that

The Denver Union Water Company, a corporation, and The
560 New York Trust Company, a corporation, have and recover
against The City and County of Denver, a municipal corporation, Robert W. Speer, as Mayor of the City and County of Denver,

Burt F. Davis, as Clerk of said City and County of Denver, Albion K. Vickery, as Auditor of said City and County of Denver, Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows, as members of and constituting the Public Utilities Commission of said City and County of Denver, Ellis Meredith, A. E. Mauff and Harry Petrie, as members of and constituting the Election Commission of said City and County of Denver, the sum of twenty dollars for their costs herein and have execution therefor.

May 19, 1911.

(*Petition of Appellant for a Rehearing.*)

And on the tenth day of July, A. D. 1911, a petition of appellant for a rehearing was filed in cause No. 3480, which petition is omitted at this point for the reason that a copy thereof appears at page 530 et seq. of this transcript.

561 (*Order Denying Petition of Appellant for a Rehearing in Cause No.* 3480.)

And on the sixteenth day of October, A. D. 1911, in the record of the proceedings of said Circuit Court of Appeals is an order denying the petition of appellant for a rehearing in cause No. 3480, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, September Term, 1911.

No. 3480.

THE CITY AND COUNTY OF DENVER, a Municipal Corporation, et al., Appellants,

vs.

THE DENVER UNION WATER COMPANY, a Corporation, et al.

Appeal from the Circuit Court of the United States for the District of Colorado.

MONDAY, *October* 16, 1911.

This cause came on this day to be heard upon the petition for a rehearing, filed by Counsel for Appellants.

On consideration whereof, it is now here ordered by this Court, that said petition for a rehearing of this cause, be, and the same is hereby, denied.

October 16, 1911.

562 (*Clerk's Certificate.*)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing transcript, consisting of two volumes, volume one being paged from *a* to 506 inclusive, and volume two being paged from 507 to 561

inclusive, contains full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of said United States Circuit Court of Appeals, in certain causes in said Court wherein The City and County of Denver, a Municipal Corporation, et al., are Appellants, and The New York Trust Company, a Corporation, et al., are Appellees, No. 3479, and wherein The City and County of Denver, a Municipal Corporation, et al., are Appellants, and The Denver Union Water Company, a Corporation, et al., are Appellees, No. 3480, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that on the Seventh day of November, A. D. 1911, a mandate was issued out of said United States Circuit Court of Appeals in each of the above entitled causes, directed to the Judges of the Circuit Court of the United States for the District of Colorado.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this third day of May, A. D. 1912.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

563 UNITED STATES OF AMERICA, *ss:*

In the Supreme Court.

No. 1127.

THE CITY AND COUNTY OF DENVER, a Municipal Corporation, et al., Petitioners,
vs.
THE NEW YORK TRUST COMPANY, a Corporation, et al., Respondents.

Stipulation.

It is hereby stipulated and agreed that the certified transcript of record in the above entitled cause, now on file in the above Court, can be taken as the return to the Writ of Certiorari heretofore and on to-wit, the twenty-eighth day of May, A. D. 1912, issued out of the said Court to the Honorable, the Judges of the United States Circuit Court of Appeals for the Eighth Circuit.

W. H. BRYANT,
Attorney for the City and County of Denver.
CHARLES W. WATERMAN,
Solicitors for the Petitioners.
JOEL F. VAILE,
HENRY McALLISTER, JR.,
WILLIAM N. VAILE,
Solicitors for the New York Trust Company.
GERALD HUGHES,
CLAYTON C. DORSEY,
Solicitors for The Denver Union Water Co. and The South Platte Canal and Reservoir Company.

(Endorsed:) No. 3479. The City and County of Denver, et al., Appellants, vs. The New York Trust Co., et al. Stipulation as to Return to Writ of Certiorari. Filed Jun. 4, 1912, John D. Jordan, Clerk.

564 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Eighth Circuit, Greeting:

Being informed that there is now pending before you a suit in which The City and County of Denver, a municipal corporation, Robert W. Speer, as Mayor of the City and County of Denver, et al., are appellants, and The New York Trust Company, a corporation, The Denver Union Water Company, a corporation, and The South Platte Canal & Reservoir Company, a corporation, No. 3479, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the Circuit Court of the United States for the District of Colorado, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command
565 you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 28th day of May, in the year of our Lord one thousand nine hundred and twelve.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

566 *Return to Writ.*

UNITED STATES OF AMERICA,
Eighth Circuit, ss:

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of The City and County of Denver, et al., Appellants, vs. The New York Trust Company, et al., No. 3479, is a full, true and complete transcript with all the pleadings, proceedings and record entries in said cause.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth

Circuit, at office in the City of St. Louis, Missouri, this eighth day of June, A. D. 1912.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

[Endorsed:] File No. 23,203. Supreme Court of the United States, No. 1127, October Term, 1911. The City and County of Denver et al. vs. The New York Trust Company et al. Writ of Certiorari. Filed Jun- 4, 1912. John D. Jordan, Clerk.

567 [Endorsed:] File No. 23,203. Supreme Court U. S., October Term, 1911. Term No. 1127. The City and County of Denver et al., Petitioners, vs. The New York Trust Co. et al. Writ of certiorari and return. Filed June 10, 1912.

568 UNITED STATES OF AMERICA, *ss:*

In the Supreme Court.

No. 1128.

THE CITY AND COUNTY OF DENVER, a Municipal Corporation, et al., Petitioners,
vs.
THE DENVER UNION WATER COMPANY, a Corporation, et al., Respondents.

Stipulation.

It is hereby stipulated and agreed that the certified transcript of record in the above entitled cause, now on file in the above Court, can be taken as the return to the Writ of Certiorari heretofore and on to-wit, the twenty-eighth day of May, A. D. 1912, issued out of the said Court to the Honorable the Judges of the United States Circuit Court of Appeals for the Eighth Circuit.

W. H. BRYANT,
Attorney for the City and County of Denver.
CHARLES W. WATERMAN,
Solicitors for the Petitioners.
JOEL F. VAILE,
HENRY McALLISTER, JR.,
WILLIAM N. VAILE,
Solicitors for the New York Trust Company.
GERALD HUGHES,
CLAYTON C. DORSEY,
Solicitors for The Denver Union Water Co. and The South Platte Canal and Reservoir Company.

(Endorsed:) No. 3480. The City and County of Denver, et al., Appellants, vs. Denver Union Water Company, et al. Stipulation as to Return to Writ of Certiorari. Filed Jun- 4, 1912. John D. Jordan, Clerk.

569 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Eighth Circuit, Greeting:

Being informed that there is now pending before you a suit in which The City and County of Denver, a municipal corporation, Robert W. Speer, as Mayor of the City and County of Denver, et al., are appellants, and The Denver Union Water Company, a corporation, and The New York Trust Company, a corporation, are appellees, No. 3480, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the Circuit Court of the United States for the District of Colorado, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States,

570 Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 28th day of May, in the year of our Lord one thousand nine hundred and twelve.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

571 [Endorsed:] File No. 23,204. Supreme Court of the United States, No. 1128, October Term, 1911. The City and County of Denver et al. vs. The Denver Union Water Company et al. Writ of Certiorari. Filed Jun- 4, 1912. John D. Jordan, Clerk.

Return to Writ.

UNITED STATES OF AMERICA,
Eighth Circuit, ss:

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of The City and County of Denver, et al., Appellants, vs. The Denver Union Water Company, et al., No. 3480, is

a full, true and complete transcript with all the pleadings, proceedings and record entries in said cause.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this eighth day of June, A. D. 1912.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

572 [Endorsed:] File No. 23,204. Supreme Court U. S. October Term, 1911. Term No. 1128. The City and County of Denver et al., Petitioners, vs. The Denver Union Water Company et al. Writ of certiorari and return. Filed June 10, 1912.

2

Office Supreme Court, U. S.
FILED.
JUN 7 1912
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

Nos. 642 & 643

THE CITY AND COUNTY OF DENVER ET AL., PETITIONERS,

vs.

THE NEW YORK TRUST COMPANY, THE DENVER UNION WATER COMPANY, THE SOUTH PLATTE CANAL AND RESERVOIR COMPANY,

AND

THE CITY AND COUNTY OF DENVER ET AL.

vs.

THE DENVER UNION WATER COMPANY AND THE NEW YORK TRUST COMPANY.

MOTION TO ADVANCE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

Nos 1127 and 1128.

THE CITY AND COUNTY OF DENVER ET AL., PETITIONERS,

vs.

THE NEW YORK TRUST COMPANY, THE DENVER UNION WATER COMPANY, THE SOUTH PLATTE CANAL AND RESERVOIR COMPANY,

AND

THE CITY AND COUNTY OF DENVER ET AL.

vs.

THE DENVER UNION WATER COMPANY AND THE NEW YORK TRUST COMPANY.

MOTION TO ADVANCE.

Petitions for certiorari to review the order of the United States Circuit Court of Appeals affirming the action of the United States Circuit Court

for the District of Colorado, granting temporary injunctions against petitioners in above-entitled causes, were granted by this honorable court on May 29, 1912.

Counsel for all parties herein now respectfully move that the causes may be advanced for early hearing at the next term of this court, because:

FIRST.

Appellate review of the temporary injunctions issued herein is authorized by section 7 of the act of March 3, 1891, 26 Stats., 826, as amended; 28 Stats., 666; 31 Stats., 160, and now section 129, Federal Code; Act March 3, 1911, 36 Stats., 1134. That section provides:

> "That the appeal must be taken within " thirty days from the entry of such order " or decree, and it shall take precedence in " the appellate court" * * *.

Prompt review in this court is, we submit, within the spirit and purpose of this provision. Whilst the cause has proceeded to final hearing in the circuit court, pending hearing and determination of the appeals in the Circuit Court of Appeals, such temporary injunctions forbade petitioners from issuing or selling bonds or taking other steps toward the construction or putting into operation of a new municipal system of water works or constructing a municipal plant or from

interfering with the water company in the exercise of its contract and franchise rights. Obviously the questions thus presented upon the record now before this court are hence fundamental and controlling. Until here determined, the litigation must be halted below. Such is the apparent situation, as appears by the sworn statement of counsel appended to the brief of respondents submitted in opposition to the petitions for certiorari when granted by this court. For the convenience of the court we print that statement as an appendix hereto. The situation here, therefore, presents in strongest manner a case within both the direction and spirit of the statute (section 129), requiring early hearing in the appellate courts. The purpose of the statute in this regard was so expressed in *Ex Parte National Enameling Co.*, 201 U. S., 156, 162.

SECOND.

At present the city of Denver and its inhabitants are solely dependent for water supply upon the existing plant of the Denver Union Water Company. While the city is thus enjoined from construction of a municipal water plant, the water company in turn justly claims to be seriously embarrassed by the delay in this litigation in respect to carrying out plans for enlargement and betterment of its water plant, especially in respect to refinancing its first mortgage bonds, which mature

in 1914. The matter is plainly one of great public interest to a large and rapidly growing municipality, and all parties will suffer by delay unless the case is advanced to early hearing and determination in this court.

Respectfully submitted,

W. H. BRYANT,
Successor to Harry A. Lindsley,
City Attorney.
C. S. THOMAS,
C. W. WATERMAN,
Attorneys for Petitioners.
JOEL F. VAILE,
HENRY MCALLISTER,
Attorneys for New York Trust Co.
GERALD HUGHES,
C. C. DORSEY,
Attorneys for The Denver Union Company and The South Platte Canal & Reservoir Co.

ALDIS B. BROWNE,
Of Counsel.

APPENDIX.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1911.

THE CITY AND COUNTY OF DENVER, a Municipal Corporation; ROBERT W. SPEER, as Mayor of Said City and County of Denver; BURT F. DAVIS, as Clerk of Said City and County of Denver; ALBION K. VICKERY, as Auditor of Said City and County of Denver; ARMOUR C. ANDERSON, EDWIN VAN CISE, and A. LINCOLN FELLOWS, as Members of and Constituting the Public Utilities Commission of Said City and County of Denver; ELLIS MEREDITH, A. E. MAUFF, and HARRY PETRIE, as Members of and Constituting the Election Commission of Said City and County of Denver, *Petitioners*,

vs.

THE NEW YORK TRUST COMPANY, a Corporation; THE DENVER UNION WATER COMPANY, a Corporation, and THE SOUTH PLATTE CANAL AND RESERVOIR COMPANY, a Corporation, *Respondents;*

AND

THE CITY AND COUNTY OF DENVER, a Municipal Corporation; ROBERT W. SPEER, as Mayor of Said City and County of Denver; BURT F. DAVIS, as Clerk of Said City and County of Denver; ALBION K. VICKERY, as Auditor of Said City and County of Denver; ARMOUR C. ANDERSON, EDWIN VAN CISE, and A. LINCOLN FELLOWS, as Members of and Constituting the Public Utilities Commission of Said City and County of Denver; ELLIS MEREDITH, A. E. MAUFF, and HARRY PETRIE, as Members of and Constituting the Election Commission of Said City and County of Denver, *Petitioners*,

vs.

THE DENVER UNION WATER COMPANY, a Corporation, and THE NEW YORK TRUST COMPANY, a Corporation, *Respondents*.

Affidavit of Henry McAllister, Jr., One of the Solicitors for the Respondent The New York Trust Company.

STATE OF COLORADO,
City and County of Denver, ss:

Henry McAllister, Jr., being first duly sworn, on his oath deposes and says that he is, and at all times hereinafter mentioned has been, an attorney at law, duly admitted to the bars of the Supreme Court of the United States, the Supreme Court of the State of Colorado, the United States Circuit (now District) Court for Colorado, and the Circuit Court of Appeals for the Eighth Circuit; and he is, and ever since the commencement in the said circuit court of the suit now sought to be reviewed

by certiorari in this court he has been, the solicitor for The New York Trust Company, the complainant in said suit, which filed its bill in the said circuit court in the month of August, 1910; and he has represented it as such solicitor, not only in the progress thereof in said circuit, now district, court, but also on the appeal to the Circuit Court of Appeals for the Eighth Circuit from the orders of injunction entered by the circuit court on or about September 6, 1910. The facts hereinafter stated are based not only upon affiant's personal knowledge of the proceedings which have been taken in said suits in both of said courts, but also upon an examination of the docket of said circuit court and information furnished to him by the clerk of the said Circuit Court of Appeals.

The opinion of the Circuit Court of Appeals upon the aforesaid appeal, reported in 187 Federal Reporter, page 890, was rendered on May 19, 1911. Thereafter, and on or about July 6, 1911, the appellants in said court, to wit, the City and County of Denver and its officers or agents, filed therein their petition and brief for rehearing. Thereafter, and on or about October 10, 1911, as affiant was and is informed by the clerk of the Circuit Court of Appeals, the said appellants tendered to said clerk for filing a so-called supplemental petition for rehearing, wherein they raised for the first time in either court the question whether the district judge for the district of Colorado had the power to grant the preliminary injunctions in question, in view of section 17 of the Commerce Court Act. Affiant is informed by such clerk that said supplemental petition was not filed by him for the reason that he had already received a direction from the judges of said court to prepare an order overruling the original petition for rehearing. Such order denying said petition was

actually entered upon October 16, 1911, and affiant is informed by the clerk of said court that the so-called supplemental petition for rehearing was not presented to the judges of said court for the reasons above stated. No further proceedings in said cause were taken in the Circuit Court of Appeals, except that upon November 7, 1911, mandates were issued therefrom upon the opinion above mentioned, and such mandates were actually received and filed by the clerk of the circuit court at Denver, on November 9, 1911.

Meanwhile, and after the rendition of the opinion of the Circuit Court of Appeals, but prior to the filing in the lower court of the mandates above mentioned, various proceedings were taken in said cause in the circuit court, some of which were as follows:

On June 5, 1911, the complainant and cross-complainant filed their exceptions to a certain cross-bill theretofore filed by the City and County of Denver and others, and on June 28, 1911, such exceptions came on for hearing before the court and were sustained, and on a demurrer of *ore tenus* the cross-bill was dismissed.

On July 21, 1911, the complainant filed an amendment to its original and supplemental bills of complaint.

On August 5, 1911, the defendant City and County of Denver and others, now petitioners herein, filed their demurrer to the said bill and supplemental bill as amended, and on August 25, 1911, the same came on for hearing, and after argument was overruled.

On September 6, 1911, the said defendants, now petitioners, filed their separate joint and several answers to the bill as amended and supplemented.

On October 2, 1911, the general replications of the complainants to the several answers of the de-

fendants The Denver Union Water Company, The South Platte Canal and Reservoir Company, and the City and County of Denver and others were filed.

Prior to the last-mentioned date the case had also been put at issue upon the cross-bill of The Denver Union Water Company.

As above stated, the mandates from the Circuit Court of Appeals were filed in the trial court on November 9, 1911. Thereafter, by stipulation of all parties and by orders of the court, the time for taking testimony in the suit was extended until February 19, 1912.

During the month of December, 1911, various conferences were had between the solicitors for all parties, including the solicitors for the present petitioners, with respect to a statement of certain facts in the controversy, and in consequence thereof an elaborate statement of those facts was thereafter prepared, signed, and filed.

Beginning with December 27, 1911, and ending February 19, 1912, many days were spent before the Examiner in Chancery in taking testimony in the suits, the present petitioners being represented by the same solicitors who are presenting the petition for certiorari to this court, and extended testimony was given, all of which was thereafter certified by the examiner to the court and filed therein.

On or about March 18, 1912, the suit was set for final hearing on April 19, 1912, and notices to that effect were duly mailed to all of the solicitors for the various parties.

On April 23, 1912, the cause came on for final hearing in the said district court, Honorable Jacob Trieber, United States District Judge for the Eastern District of Arkansas, presiding upon assignment; and beginning with that date and end-

ing on April 27, 1912, extended oral arguments were made, the present petitioners appearing therein as defendants, through their solicitors now representing them upon their application for certiorari, and on April 27, 1912, the cause was submitted to the district court and was by it taken under advisement.

Affiant knows that except in so far as the question was attempted to be raised in the Circuit Court of Appeals by the so-called supplemental petition tendered for filing, the present petitioners have never challenged in the said circuit or distric court, or in the Circuit Court of Appeals, the right of one judge to pass upon the applications for interlocutory injunctions.

Copies of the present petition for certiorari, and the brief in support thereof, were served upon affiant at Denver, Colorado, on the afternoon of Friday, the third day of May, 1912. Never before that time did the present petitioners, or any one for them, suggest to the said court or to affiant that the making of such application was under contemplation.

And further affiant saith not.

HENRY MCALLISTER, JR.

Subscribed and sworn to before me this 9th day of May, 1912.

My commission expires July 30, 1912.

[SEAL.] (Sgd.) OLIVER DEAN,
Notary Public, City and County of Denver.

Copy.

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

THE CITY AND COUNTY OF DENVER, A MUNICIPAL CORPORATION; ROBERT W. SPEER, AS MAYOR OF SAID CITY AND COUNTY OF DENVER; BURT F. DAVIS, AS CLERK OF SAID CITY AND COUNTY OF DENVER; ALBION K. VICKERY, AS AUDITOR OF SAID CITY AND COUNTY OF DENVER; ARMOUR C. ANDERSON, EDWIN VAN CISE AND A. LINCOLN FELLOWS, AS MEMBERS OF AND CONSTITUTING THE PUBLIC UTILITIES COMMISSION OF SAID CITY AND COUNTY OF DENVER; ELLIS MEREDITH, A. E. MAUFF AND HARRY PETRIE, AS MEMBERS OF AND CONSTITUTING THE ELECTION COMMISSION OF SAID CITY AND COUNTY OF DENVER,

PETITIONERS,

VS.

THE NEW YORK TRUST COMPANY, A CORPORATION; THE DENVER UNION WATER COMPANY, A CORPORATION, AND THE SOUTH PLATTE CANAL AND RESERVOIR COMPANY, A CORPORATION,

RESPONDENTS;

AND

THE CITY AND COUNTY OF DENVER, A MUNICIPAL CORPORATION; ROBERT W. SPEER, AS MAYOR OF SAID CITY AND COUNTY OF DENVER; BURT F. DAVIS, AS CLERK OF SAID CITY AND COUNTY OF DENVER; ALBION K. VICKERY, AS AUDITOR OF SAID CITY AND COUNTY OF DENVER; ARMOUR C. ANDERSON, EDWIN VAN CISE AND A. LINCOLN FELLOWS, AS MEMBERS OF AND CONSTITUTING THE PUBLIC UTILITIES COMMISSION OF SAID CITY AND COUNTY OF DENVER; ELLIS MEREDITH, A. E. MAUFF AND HARRY PETRIE, AS MEMBERS OF AND CONSTITUTING THE ELECTION COMMISSION OF SAID CITY AND COUNTY OF DENVER,

PETITIONERS,

VS.

THE DENVER UNION WATER COMPANY, A CORPORATION, AND THE NEW YORK TRUST COMPANY, A CORPORATION,

RESPONDENTS.

NOTICE.

The respondents above named are hereby notified that the above-named petitioners will, on Monday, the 13th day of May, 1912, at the opening of the court on that day, or as soon thereafter as counsel can be heard, submit a motion to the Supreme Court of the United States, in its court room at the Capitol, in the City of Washington, D. C., upon their veri-

fied petition for writ of certiorari and a copy of the entire record in the cause in said petition and motion designated, a copy of which motion and petition for writ of certiorari and of a brief in support thereof are herewith delivered to you.

CHARLES S. THOMAS,
HENRY A. LINDSLEY,
City and County Attorney,
By Chas. S. Thomas,
CHARLES W. WATERMAN.
Solicitors for Petitioners.

Receipt of copies of the foregoing notice of said motion, and of the said petition for writ of certiorari and brief in support thereof, is hereby acknowledged.

JOEL F. VAILE,
HENRY McALLISTER, Jr.,
WILLIAM N. VAILE.
Solicitors for Respondent, The New York Trust Company.

GERALD HUGHES,
CLAYTON C. DORSEY.
Solicitors for Respondents, The Denver Union Water Company and The South Platte Canal and Reservoir Company.

MOTION.

Now come the City and County of Denver, a municipal corporation; Robert W. Speer, as mayor of the City and County of Denver; Burt F. Davis, as clerk of said City and County of Denver; Albion K. Vickery, as auditor of said City and County of Denver; Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows, as members of and constituting the Public Utilities Commission of said City and County of Denver; and Ellis Meredith, A. E. Mauff and Harry Petrie, as members of and constituting the Election Commission of said City and County of Denver, the above-named petitioners, by Charles S. Thomas and Charles W. Waterman, their counsel, and move this honorable court that it shall by certiorari, or other proper process, directed to the honorable the judges of the United States Circuit Court of Appeals for the Eighth Circuit, require said court to certify to this court for its review and determination a certain cause in said Circuit Court of Appeals lately pending, wherein upon an appeal to said Circuit Court of Appeals from a certain order of injunction entered in said cause upon the bill of complaint of said New York Trust Company on the 6th day of September, 1910, by the Circuit Court of the United States for the District of Colorado, said petitioners were appellants, and The New York Trust Company, The Denver Union Water Company and The South Platte Canal and Reservoir Company, respondents above named, were appellees, and wherein, upon an appeal to said Circuit Court of Appeals from a certain order of injunction entered in said cause upon the cross-bill of said The

Denver Union Water Company on the 6th day of September, 1910, by said Circuit Court, said petitioners were appellants, and said respondents, The New York Trust Company and The Denver Union Water Company, were appellees, and to that end tender herewith their petition, together with a certified copy of the record in said cause.

CHARLES S. THOMAS,
HENRY A. LINDSLEY,
City and County Attorney,
By Chas. S. Thomas,
CHARLES W. WATERMAN.
Solicitors for said Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable the Supreme Court of the United States:

Come now the City and County of Denver, a municipal corporation; Robert M. Speer, as mayor of said City and County of Denver; Burt F. Davis, as clerk of said City and County of Denver; Albion K. Vickery, as auditor of said City and County of Denver; Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows, as members of and constituting the Public Utilities Commission of said City and County of Denver; Ellis Meredith, A. E. Mauff and Harry

Petrie, as members of and constituting the Election Commission of said City and County of Denver, the above-named petitioners, and respectfully show to this honorable court that on, to-wit, the 22nd day of August, A. D. 1910, there was filed in the Circuit Court of the United States for the District of Colorado a bill in equity by The New York Trust Company against these petitioners and The Denver Union Water Company, a corporation, and The South Platte Canal and Reservoir Company, a corporation, wherein it alleged that from 1870 to October 18, 1894, numerous corporations had been engaged in supplying the municipalities of Denver, Barnum, Colfax, Harman, Highlands, South Denver, Argo, Globeville, Montclair and Valverde, all of which are now included within the territorial limits of the present City and County of Denver, one of these petitioners, such corporations being The Denver City Water Company, The Denver City Irrigation and Water Company, The Denver Water Company, The Domestic Water Company, The American Water Works Company of New Jersey, The Mountain Water Company, The Beaver Brook Water Company and The Citizens Water Company; that on, and for several years prior to October 18, 1894, all of the properties of the said companies, including their franchises and contracts, had been acquired by The American Water Works Company of New Jersey and The Citizens Water Company; that on October 18, 1894, the defendant, The Denver Union Water Company, acquired by purchase all the properties, etc., of The American Water Works Company of New Jersey and The Citizens Water Company; that on October 20, 1894, The Den-

ver Union Water Company executed a mortgage to secure the payment of an issue of bonds, and that The New York Trust Company is the trustee under said mortgage.

That among the ordinances still in force, the rights under which were acquired by The Denver Union Water Company, was Ordinance 44 of the Series of 1890 of the City of Denver, wherein there were granted to The Denver Water Company its successors and assigns, certain rights and privileges, and whereby a certain contract was made between the city and the company. Sections 11 and 12 of said ordinance are as follows:

> "Sec. 11. At the expiration of the period of twenty years from and after the date of the passage and approval of the ordinance, in case the City shall then elect so to do, the said works may be purchased by the said City, and in case the parties cannot agree, after such election, upon the price to be paid by the City for the water works of the said Company, its successors and assigns, then their fair cash value shall be determined by arbitration, by five disinterested persons, none of whom shall be residents of Denver, two of them to be chosen by the City, two by the Company, and the fifth by the four first chosen, and in case of failure on the part of the Company to name arbitrators for the period of thirty days after the City shall have named arbitrators and notified the Company so to do, the City may apply to any Court having equity jurisdiction in the

County in which the City of Denver shall then be situated for the appointment of two persons of the qualifications aforesaid as such arbitrators, and the Court may thereupon appoint two such persons, who shall act with the same force and effect as if appointed by the Company, and the decision of a majority of said Board shall be final and binding upon both parties, and upon the payment, or tender of payment, by said City the said Company shall convey to said City all of its property, real or personal, easements, rights and privileges, and thereafter all franchises, rights and privileges which have been at any time theretofore granted said Company, its successors or assigns, and which it may then possess, shall cease and be at an end.

Sec. 12. At the expiration of the said period of twenty years the said City may, at its election, renew the contract hereby made, by ordinance to that effect, for a like period of twenty years, but at a price for hydrant rental 10 per cent less than mentioned in Section 10 hereof, for the period remaining after the ten years after May 1st, 1891, and for successive periods of twenty years at the price last aforesaid, as often and as long as the City may choose. This section is conditioned, however, upon the full performance by the City of the provisions of section 2 hereof."

That Ordinance 163 of the Series of 1907, enacted by the City and County of Denver, and accepted by The Denver Union Water Company, provides for the appointment of five appraisers, who should determine and fix the fair cash value of the property, business and rights owned or used by The Denver Union Water Company, its allied and auxiliary corporations and associations, and persons connected with it, by which said company supplied water to the City and County of Denver, and its inhabitants, or to anyone else at any place whatever, including all the property, rights and privileges, of every kind and nature whatsoever, acquired by The Denver Union Water Company from its predecessor, The Denver Water Company, or from any person or corporation whatsoever, and whether the title be held by The Denver Union Water Company or by some other person. It was also provided that the city should have the privilege of having the appraisement of the said property, rights, etc., made forthwith, The Denver Union Water Company waiving any rights as to the time of appraisement provided for in Ordinance 44 of 1890.

It is alleged by the complainant that the appraisement provided for in Ordinance 163 of 1907 is the same appraisement provided for in Ordinance 44 of 1890, and that Ordinance 163 of 1907 is an election by the city to purchase (under the right reserved to it by section 11 of Ordinance 44 of 1890), if it shall not renew the company's franchise or contract (under section 12 of Ordinance 44 of 1890). It is also alleged that, under the provisions of Ordinance 163, appraisers were appointed who fixed the valua-

tion of the property, franchises, etc., owned or used by The Denver Union Water Company, as provided in said ordinance, at $14,400,000, which valuation is binding upon the city and the company; that the city has refused to complete the said purchase or to pay for said property, and has never granted to the Water Company a new franchise; that the city now claims that the appraisement was only tentative, and that it might elect or refuse to purchase at the appraised value; but it is alleged that such construction given to Ordinance 163 would make it unconstitutional as impairing the obligation of the contract between the city and the bondholders, and particularly that part contained in section 11 of Ordinance 44 of 1890, and would deprive them of their property without due process of law; that since the appraisement was made the city has refused to submit to the voters the question whether it should purchase the waterworks at the appraised valuation.

That at the general city election in May, 1910, there was adopted a so-called amendment to the charter, designated section 264a, whereby a Public Utilities Commission was created, and wherein it is provided that if the Water Company should place a conveyance of all of its property to the city in escrow to be delivered in exchange for $7,000,000 bonds of the city, then the commission should file its acceptance, and the same should constitute a binding contract of purchase; that in case the company should refuse, then there should be submitted to the voters the question of issuing $8,000,000 bonds to be sold for the purpose of constructing a municipal water plant. That defendant Water Company did not exe-

cute such conveyance, nor would the Trust Company have joined in such a conveyance or permitted the same to be made. That there was passed by the City Council Ordinance 98 of 1910, calling an election for September 6, 1910, as provided in charter section 264a, providing that, in the event the Water Company failed to execute the conveyance of its property to the city, there should be submitted the question of issuing $8,000,000 bonds for the purpose of constructing a municipal plant. That the city is without authority to obtain by purchase a complete waterworks system already constructed and furnishing an adequate supply of water, and at the same time to construct another complete system or to authorize bonds for that purpose. That, inasmuch as the city had already entered into a binding contract to purchase the water system for $14,400,000, section 264a is beyond its powers.

That even though there had been no election by the city to purchase the Water Company's plant prior to the adoption of charter section 264a, yet that section constitutes an election to purchase and at $14,400,000. But if it should be held not to be an election to purchase at that amount, then it is necessary to have the purchase price fixed by appraisers, whom the city has failed and refused to name. On the contrary, by the terms of charter section 264a, and the acts of the Public Utilities Commission, it intends to repudiate its obligation to submit such question to an appraisement. That in the deed of trust it is provided that in case of the purchase of the property of the company by the city, as contemplated by section 11 of Ordinance 44 of 1890, all moneys to be

received by the company from the city should be payable directly to the Trust Company by the city. That the Water Company asserts that the valuation of $14,400,000 is inadequate, and that the city, by reason of its refusal to consummate the purchase of the property at that value, has become obligated to renew its contract with the Company for twenty years, as provided in Ordinance 44 of 1890, and that said company will not bring any suit against the city founded on any contract or election to purchase, but will assert and litigate its right to such new contract for twenty years. That if the election set for September 6 is held, and the bonds authorized and issued and sold, the city will be irrevocably committed to the purchase of a competitive water plant, destructive of the income-producing and salable value of the Water Company's system and impairing the value of the security of the bondholders. That there will be placed upon the city and its inhabitants a great and useless burden of indebtedness. That, in addition to said indebtedness, the taxpayers must also pay the appraised value of the Water Company's plant, as they are now obligated to do. Wherefore an injunction is prayed for to restrain the city and its officers from holding the election, from issuing the bonds, from taking any steps looking to the construction of a municipal plant, and that a decree be entered declaring those provisions of charter section 264a void that contemplated the construction of a municipal plant and the authorization of bonds, for the reason that they conflict with the Constitutions of the United States and of Colorado; and declaring the true effect of the existing contract relations be-

tween the city and the company, and decreeing that the city is obligated to complete the purchase of the Water Company's plant at the appraised value, or to appoint appraisers to fix the value thereof.

And thereafter and on, to-wit, the 25th day of August, 1910, there was filed an answer by the defendant, The Denver Union Water Company, admitting the passage and approval of Ordinance 163 of 1907 and the acceptance thereof by the Water Company; denying the validity of charter section 264a and the legal existence of the Public Utilities Commission; alleging that Ordinance 44 of 1890 is still in force and binding upon the City and County of Denver, except as it may have been modified by Ordinance 163 of 1907; that Ordinance 44 provides that the rights and privileges thereby granted should terminate at the expiration of twenty years, in case the city should then elect to and should purchase the waterworks system of The Denver Water Company or its successor; that in case the parties should fail to agree upon the price, then their fair cash value should be determined by appraisers; that unless the city purchased the works, it was obligated to renew the franchise and the contract for like period of twenty years (but at a price for hydrant rental 10 per cent less than that provided in Ordinance 44), and for successive periods of twenty years as often and as long as the city might choose; that said ordinance contained no other limitation as to the period of time during which it should continue to be in full force and effect, nor any other provision as to its termination, except as hereinabove set forth.

That in Ordinance 163 of 1907 it was provided that the purchase by the city of the waterworks, as

contemplated in Ordinance 44 of 1890, and the appraisement thereof, might be made prior to the expiration of the twenty-year period, as provided in said Ordinance 44; that said appraisement was made and the value fixed at $14,400,000, but that the city and county did not at any time prior to the expiration of the twenty-year period complete the purchase by making the payment, nor has it done so, but by virtue of the adoption of charter section 264a has declared its intention of not proceeding further with said purchse, but to erect an independent municipal plant; and that, the city and county having so failed and refused to complete the purchase The Denver Union Water Company is entitled to a renewal of the terms of Ordinance 44 of 1890, but that the city and county refuses to acknowledge the Water Company's right to a renewal.

It is further alleged that charter section 264a is void because it was never properly submitted or voted upon, nor is it a proper amendment, but a new and independent charter, and that it contains numerous independent and unrelated matters not germane to one another nor *in pari materia;* and that it is void because violative of Article XX of the Constitution of the State of Colorado, under which it was enacted, and that it is violative of the Constitutions of Colorado and of the United States in that it impairs the obligation of the contract contained in Ordinance 44 of 1890, and in that thereby the Water Company is denied the equal protection of the laws, and in that it constitutes a deprivation of the Water Company's property without due process of law; and that Article XX of the Constitution of Colorado, under which the present charter of the City and County of Denver,

including section 264a thereof, was adopted, is void because in violation of that provision of the Constitution of the United States which guarantees to each state a republican form of government, and in violation of the Constitution of Colorado; and that charter section 264a is in conflict with other provisions of the charter of the City and County of Denver.

And thereafter and on, to-wit, the 25th day of August, A. D. 1910, there was filed a cross-bill by The Denver Union Water Company against The New York Trust Company and all of these petitioners, making practically the same allegations that are set forth in the answer filed by the said Water Company, and practically the same allegations made in the bill of the said Trust Company, except as to the legal effect of Ordinance 44 of 1890, and the acts of the city and its officers, the Trust Company contending that the city had elected to purchase the works of the Water Company (under the provisions of section 11 of said Ordinance 44 of 1890), either by the enactment of Ordinance 163 of 1907 or by the adoption of charter amendment 264a, and either for the price fixed by the appraisers of $14,400,000 or for some price as yet unfixed; while the Water Company contends that, as the city was compelled by Ordinance 44 of 1890 either to purchase the waterworks or to renew its franchise and contract, and as the city had refused to purchase, it is compelled to renew said franchise and contract. It is also alleged that The Denver Union Water Company is a taxpayer in the City and County of Denver, and that, should the contemplated bond issue become a binding obligation on the said city and county and its inhabitants, the Water Company will be taxed to pay therefor, and the bonds

will constitute a cloud upon its title. It closes with a prayer asking that section 264a of the charter of the City and County of Denver be declared unconstitutional, that the Water Company be decreed to be entitled to a renewal of its contract and franchise for a period of twenty years, and that these petitioners be enjoined forever from in any manner interfering with the enjoyment of the full rights of said renewal by the Water Company.

That afterwards and on, to-wit, the 12th day of September, 1910, The New York Trust Company filed a supplemental bill, and on, to-wit, the 16th day of September, 1910, The Denver Union Water Company filed a supplemental cross-bill, both of which were incorporated into the transcript of record filed in the United States Court of Appeals on the appeals taken from the orders granting temporary injunctions; said supplemental bill and supplemental cross-bill alleging that the election which complainant and cross-complainant had sought to enjoin had been held, and that the submission of the bond issue had been carried.

And thereafter the said cause was heard in the said Circuit Court of the United States on the applications of the complainant and cross-complainant for injunctions, and after considering the pleadings and affidavits offered by the parties, orders were made in said court granting temporary injunctions to the complainant and cross-complainant, on, to-wit, the 6th day of September, A. D. 1910, enjoining these petitioners from issuing or selling any bonds by authority of the election to be held on September 6, 1910, or taking any steps toward the construction or putting into operation of a new system of waterworks or constructing a municipal plant, or from interfering with the Water

Company in the exercise of its contract and franchise rights under Ordinance 44 of the Series of 1890 and Ordinance 163 of the Series of 1907, and otherwise. The city was permitted to proceed with and to hold the election, but was forbidden to take any action thereafter or thereunder.

That thereafter and on, to-wit, the 21st day of September, 1910, appeals were allowed from said orders and were perfected, and on the 24th day of September, 1910, a transcript of all the proceedings was filed in the United States Circuit Court of Appeals for the Eighth Circuit, and said causes were entered and docketed in said Court of Appeals, numbered 3479 and entitled: The City and County of Denver, a Municipal Corporation, et al., Appellants, vs. The New York Trust Company, a Corporation, et al., Appellees, and numbered 3480, The City and County of Denver, a Municipal Corporation, et al., Appellants, vs. The Denver Union Water Company, a Corporation, et al., Appellees, respectively.

That the assignments of errors filed in said causes were as follows:

To the decree rendered on the bill:

(First) The said court had no jurisdiction of the said cause.

(Second) The said court did not arrange the parties herein according to their respective interests, which, if done, would have destroyed the necessary diversity of citizenship of the parties and defeated its jurisdiction based on such diversity.

(Third) No federal question, or question arising under the Constitution of the United States, nor any amendment thereof or laws or treaties made thereunder, was presented by or arose from the averments

of the complainant's bill or the exhibits made a part thereof, and the court erred in holding otherwise.

(Fourth) There was no equity in complainant's bill, and no right to relief against any defendant therein named, either interlocutory or final.

(Fifth) There was and is no impairment of the obligation of any contract or agreement set forth in the bill and exhibits, by reason of any act or thing done or threatened to be done, as charged therein, against these appealing defendants or either or any of them, and the court erred in holding otherwise.

(Sixth) The action was brought and the bill framed collusively by the complainant and the defendants The Denver Union Water Company and The South Platte Canal and Reservoir Company, as shown by the record herein, for the purpose, among other things, of conferring jurisdiction upon said Circuit Court which does not exist in law, and the court erred in not dismissing the bill for that reason upon the hearing of an injunction.

(Seventh) The court erred in granting the preliminary writ of injunction as prayed for by the complainant.

(Eighth) Neither Ordinance 44, Series of 1890, nor Ordinance 163, Series of 1907, in any manner prevents the appellant city and county from constructing a water system of its own, and the Circuit Court erred in holding otherwise.

(Ninth) Section 264a of the city and county charter does not in its terms, nor will the execution of such terms or any part thereof, impair the obligation of any contract between the City of Denver and The Denver Union Water Company or its predecessors, and the Circuit Court erred in holding otherwise.

(Tenth) The Circuit Court erred in the reasons and each of them assigned by it for its order granting such preliminary writ of injunction.

(Eleventh) No act done or threatened to be done by the appealing defendants or any of them, as charged in the bill, confers any right of action or demand for relief upon the complainant company. Any right of action or demand for relief arising from such act or threatened act or acts inures to the defendant The Denver Union Water Company, and to it alone, if to anyone.

(Twelfth) The Circuit Court erred in granting any injunction whatever against the appealing defendants or any of them in favor of complainant.

(Thirteenth) The Circuit Court erred in other matters and things apparent upon the face of the record.

To the decree rendered on the cross-bill:

First—The said court had no jurisdiction of said cross-bill, (A) because it had no jurisdiction of the original bill; (B) because neither the said cross-bill nor the exhibits appended thereto and made a part thereof state or raise any question arising under the Constitution of the United States or amendments thereto, or laws or treaties made thereunder; (C) the jurisdiction of the case must depend upon the averments of fact presented by the original bill and not otherwise, and the court erred in entertaining jurisdiction thereof and in holding that any federal question was presented by the allegations of said cross-bill.

Second—Said court did not arrange the parties to the original bill herein according to their respective interests, which, if done, would have identified

the cross-complainant with the complainant and destroyed the necessary diversity of citizenship of the parties, thus ending its jurisdiction based on such diversity.

Third—There was and is no equity in the said cross-bill, no right of relief thereunder either interlocutory or final in its character.

Fourth—There was and is no impairment of the obligation of any contract set forth in said cross-bill and exhibit made a part thereof, by reason of any act or thing done or threatened to be done, as charged therein, against these appealing defendants, or either or any of them, and the court erred in holding otherwise.

Fifth—The original action was brought, and the bill and cross-bill framed, collusively, by the original complainant and the cross-complainant and The South Platte Canal and Reservoir Company, as shown by the record herein, and the court erred in not dismissing the bill and cross-bill upon the hearing for an injunction.

Sixth—The court erred in granting the preliminary writ of injunction as prayed for in the said cross-bill.

Seventh—Neither Ordinance 44, Series of 1890, nor Ordinance 163, Series of 1907, in any manner prevents the appellant city and county from constructing a water system of its own, and the Circuit Court erred in holding otherwise.

Eighth—Section 264a of the city and county charter does not in its terms, nor will the execution thereof, impair the obligation of any contract between the City of Denver or the City and County of Denver and the said cross-complainant or its predecessors, or

either of them, and the Circuit Court erred in holding otherwise.

Ninth—The Circuit Court erred in the reasons and each of them assigned by it for its order granting said preliminary writ of injunction on said cross-complaint.

Tenth—It appears from the record that the cross-complainant did not perform or comply with many of the requirements and contracts of Ordinance 44, Series of 1890, by reason whereof it is entitled to no relief prayed for thereunder, and the Circuit Court erred in holding otherwise.

Eleventh—It appeared from the record that The Denver Water Company and The Citizens Water Company, of which companies the cross-complainant company is the successor, had estopped themselves by decree of the District Court of the County of Arapahoe, State of Colorado, in a cause between them of which it had jurisdiction, from asserting any exclusive right to the streets of the City and County of Denver, or any exclusive right to furnish and supply the said city and county and the inhabitants thereof with water; and the Circuit Court erred in not so declaring and in not dismissing the bill and cross-bill.

Twelfth—It appeared from the record that Ordinance 163, Series of 1907, had not been executed and could not be executed, so that nothing could be claimed thereunder or predicated thereon as against these appealing defendants, and the court erred in not so holding and in not dismissing said bill and cross-bill.

Thirteenth—It appeared from the record in said cause that certain clauses of said Ordinance 44, of

the Series of 1890, had been adjudged void and impossible of execution, so that the same could not be renewed, and the Circuit Court erred in not holding accordingly and dismissing said bill and cross-bill.

Fourteenth—It appeared from the record in said cause that the said Ordinance 44, Series of 1890, contained impossible covenants and provisions, as declared by the said cross-complainant, and the court erred in not so holding and dismissing said bill and cross-bill.

Fifteenth—The court erred in holding that the appellant City and County of Denver had been derelict in the performance of, and had not performed, its duty under the provisions of Ordinance 163, and that the burden was and had been upon it alone to make said provisions effective or to secure their rejection, and in exempting the cross-complainant from any such duty or obligation.

Sixteenth—The Circuit Court erred in granting any injunction whatever upon the cross-bill or in favor of the cross-complainant, The Denver Union Water Company, against these appealing defendants or any of them.

Seventeenth—The Circuit Court erred in other matters and things apparent on the face of the record.

That afterwards and on, to-wit, the 24th day of January, A. D. 1911, the cases came on to be heard together in the Circuit Court of Appeals at St. Louis, before Hook, circuit judge, and Riner and Reed, district judges, and on the 29th day of May, A. D. 1911, decrees were entered in said court affirming the orders of the Circuit Court, and the opinion of the court was delivered by Hook, circuit judge.

The Circuit Court of Appeals held in its opinion:

1. That the city was required by the terms of Ordinance 44 of 1890 either to purchase the plant of the Denver Water Company or its successors at the expiration of twenty years from the date thereof, or to renew its contract.

2. That sections 11 and 12 of Ordinance 44, of the Series of 1890, state alternative propositions, one or other of which the City of Denver was obligated to perform at the expiration of twenty years from the date thereof.

3. That charter amendment section 264a, fairly construed, means that the city will neither elect to purchase the property of The Denver Union Water Company, at the value to be agreed on or fixed by appraisers, nor to renew the contract upon the terms specified in section 12 of Ordinance 44 of 1890, and hence it impairs the obligation of a contract.

4. That section 264a and Ordinance 98 of 1910 constitute an attempted annulment of all obligation of the city under Ordinance 44 of 1890.

5. That so much of charter amendment section 264a as provided a different method of acquiring a water plant from that provided for in Ordinance 44, impaired the obligation of the contract between the city and the Water Company expressed in said Ordinance 44.

6. That said part of charter amendment section 264a can only mean that the city did not mean to perform the said contract.

7. That even though the city has the power to purchase the system or to renew the franchise of the Water Company, and at the same time to construct a new plant, still section 264a impairs the obligation of

the contract of the city with the Water Company, because the intent in fact of the voters in enacting said charter amendment was to free the city from its obligation to purchase the Water Company's property or to renew its contract.

8. That if section 11 of Ordinance 44 of 1890 stood alone on the ordinance, it would be clear that the city might purchase or not purchase, as it pleased, whatever the circumstances; but that, considered with section 12 [which is in effect identical, so far as its being optional or binding is concerned, with section 11], the two create a binding contract on the city either to purchase the works, as is provided for in section 11, or to renew the contract, as is provided for in section 12, and that if it does not renew, it should purchase.

9. That section 21 of Ordinance 44 of 1890 does not require that sections 11 and 12 of said ordinance should be deemed independent agreements, with the same force and effect as if each of said sections was contained in a separate ordinance by itself.

10. That the city of Denver in 1890 had the power to bind itself to purchase the plant of the Denver Water Company at the expiration of twenty years from that date.

11. That The New York Trust Company has, as the representative of the bondholders, a right to maintain the bill to protect the property pledged to it.

12. That, as a federal question was stated in the original bill, it was unnecessary to consider the question of jurisdiction based upon diversity of citizenship.

13. That the Trust Company contended that the city was required by the terms of Ordinance 44 of 1890

either to purchase the plant of the Denver Water Company or its successors, or to renew its contract.

14. That an ordinance passed in 1894 by the City of Denver in regard to a waterworks system in South Denver showed that the intent of the city was to acquire the waterworks systems supplying all parts of the city as parts of a municipal plant, or to permit them to be acquired by The Denver Union Water Company.

That thereafter and on, to-wit, the 5th day of July, A. D. 1911, these petitioners filed in the said court a petition for rehearing, wherein the following reasons were assigned why a rehearing should be granted:

1. The court erred in holding that sections 11 and 12 of Ordinance 44 of the City of Denver, Series of 1890, were alternative covenants, whose "contract was that when the twenty-year period expired, if the city did not by ordinance grant the company a renewal embracing an obligation on its part to accept hydrant service as before and pay for the same at the reduced rate, it would take over the entire business by buying the property."

2. The court erred in failing or refusing to hold the appellee Water Company to the performance of its covenants, and particularly those of section 13 of said ordinance, as a condition to the enforcement of its terms against the appellant city and county.

3. The court erred in holding that section 264a of the charter of the city and county impaired the obligation of the contract said to be embodied in sections 11 and 12 of the said Ordinance 44.

4. The court erred in its opinion in various other respects apparent upon the face thereof.

And thereafter and on, to-wit, the 10th day of October, A. D. 1911, these petitioners filed in the said court a supplemental petition for rehearing, wherein the following additional reason was assigned:

> "Fifth—The Circuit Court for the District of Colorado had no power, jurisdiction or authority to hear said application or to grant said orders of injunction, and this honorable court was therefore without power to review the same upon the merits thereof;"

and setting up in full sections 17 and 18 of an act entitled, "An act to create a Commerce Court and to amend the act entitled 'An act to regulate commerce' approved February 4, 1887, as heretofore amended, and for other purposes," the same being section 266 of the new Federal Judicial Code, wherein and whereby it is provided that no interlocutory injunction restraining the enforcement of any statute of a state by restraining the action of any officer of such state in the enforcement of such statute shall be issued upon the ground of the unconstitutionality of such statute, unless the same shall be heard and determined by three judges, one of whom at least shall be a justice of the Supreme Court

That thereafter and on, to-wit, the 10th day of October, A. D. 1911, the Court of Appeals denied the said petition for rehearing.

And your petitioners respectfully complain that great and manifest error appeareth in said decision of the Court of Appeals as to each and every proposition by it announced, as hereinbefore recited and

as appears therein, and allege for such errors the following:

1. That in holding that Ordinance 44, of the Series of 1890, and particularly sections 11 and 12 thereof, require the City and County of Denver either to renew the franchise of and contract with The Denver Union Water Company or to purchase the plant of said company, the court adopts a construction of a franchise ordinance most unfavorable to the public, for the following reasons:

a. There is no express agreement on the part of the municipality to do either one or the other, and it is not a necessary implication that such was the intention of the parties.

b. Even conceding, for argument, that there is an ambiguity in the terms of the ordinance, the proper construction to be adopted is the one most favorable to the public, which would be that the city had a right to *either* purchase or renew, or to do *neither*.

2. Section 21 of the said ordinance provides that each grant, contract and agreement contained in the ordinance is to be deemed an independent agreement, with the same force and effect as if each section of the ordinance was contained in a separate ordinance by itself, and the decision completely disregards this express provision.

3. If section 21 is to be disregarded, so that sections 11 and 12 may be construed together, then, section 5 of said ordinance, which provides for the rates which the Water Company is to be permitted to charge during the term of the contract, and which has been declared unenforceable and void by the Su-

preme Court of Colorado in Denver vs. Water Co., 41 Colo., 77, as is shown in the opinion of the Circuit Court of Appeals is an interdependent part of the contract, and Ordinance 44 of 1890 becomes void by reason of the unenforceableness of one of the most important provisions thereof.

4. Because there can be no renewal of Ordinance 44 of 1890. Under any construction of the different sections of that ordinance, section 5 thereof having been declared unenforceable, the whole ordinance must fall, at least as to any extension of the agreement contained therein, because, if any extension of the contract is made, it will necessarily be without any control of rates by the city, and there can be no waiver of such rate-making power by the city except by its express agreement.

5. Because, even if, as the court held, charter amendment section 264a was adopted to enable the municipality to avoid its obligation to the Water company, still there is no impairment of the obligation of the contract, but a mere refusal to perform; for if the municipality was obligated to the Water Company, that obligation still exists regardless of section 264a.

6. Because the present plant of The Denver Union Water Company is not the plant which was the subject of Ordinance 44 of 1890; the present plant being made up of the plants of the Denver Water Company, which was the subject of the ordinance; The Citizens Water Company, which was a separate and competing company covering practically the same field as the Denver Water Company; and several other independent companies, which were at the

time of the enactment of Ordinance 44 of 1890 supplying outlying municipalities which were not parts of the City of Denver; all of which have been absorbed into the present plant, not as extensions thereof, but by purchase or merger.

7. That, as there was no impairment of the obligation of the contract, there was no federal question stated in the bill, and as the Water Company (a Colorado corporation) should have been aligned with the Trust Company (as plaintiff), the federal court had no jurisdiction of the cause.

8. Because the court held that the Council of the City of Denver had power to bind the city to purchase the plant of The Denver Water Company twenty years after their action was taken, whereas no such power existed in the Council.

9. Because in holding that the Trust Company contended that the city was required by the terms of Ordinance 44 of 1890 either to purchase the plant of The Denver Union Water Company or to renew its franchise, the court committed prejudicial error to these petitioners in that the bill of the Trust Company alleges that the city had an option to purchase, and afterwards elected to do so, but refused to pay the price, thereby utterly failing to state a federal question, so that the bill should have been dismissed, and the cross-bill (not praying any relief against the original complainant) with it.

10. That holding that Ordinance 54 of 1894, relative to the South Denver plant, showed the intent of the city at the time of passing Ordinance 44 of 1890 to be that it should either acquire all the water systems in the city or permit the Water Com-

pany to do so, is erroneous because under said ordinance of 1894 the city might have become the owner of the South Denver plant, while even under the court's construction of the ordinance of 1890 the Water Company might at the same time remain in possession of its own plant.

11. Because the intent of the voters in charter section 264a has no bearing on the rights of the city and the Water Company; if the city is obligated to purchase the Water Company's plant, or to renew its franchise, it is still required to do so, even though section 264a does commit the city to the erection of a separate municipal plant. If the city is obligated to buy the Water Company's plant, neither the Trust Company nor the Water Company can complain if it constructs another; and if the city is compelled to renew the Water Company's franchise and contract, that franchise and contract not being exclusive, and the city not having agreed not to enter into competition with the Water Company, neither the Water Company nor the Trust Company can complain. By holding that it was not the intent of the voters to have the city to purchase or renew and to construct, the Court of Appeals has attempted to find a federal question; but the intent of the voters, except as expressed in their acts, does not regulate the rights of the parties.

12. Because, if section 11 of Ordinance 44 of 1890, standing alone, would not require the city to purchase, it follows that if section 12 stood alone, it would not require the city to renew. Hence it is error to say that when they are taken together they create a legal liability, especially in view of the

canons of construction adopted by this court in construing grants of franchises.

13. That the interlocutory injunction was issued without authority and contrary to the statute, being issued by one judge only. Jurisdiction of the cause was taken because the obligation was impaired under the Fourteenth Amendment to the Federal Constitution, the city charter being held to be a law of the state, and hence the officers enjoined were necessarily officers of the state.

14. Because the court should have ordered the bill dismissed, as the property of The Denver Union Water Company, which The New York Trust Company in its bill prays the city may be required to pay for, is not the property which the city reserved the right to purchase in section 11 of Ordinance 44 of 1890.

15. Because The New York Trust Company, not being a party to the alleged contract between the municipality and the Water Company, cannot maintain an action for specific performance.

16. Because the court held that sections 11 and 12 expressed a contract or agreement on the part of the city to renew or to purchase, whereas those sections merely express reservations of rights by, or options in favor of, the city.

And your petitioners respectfully represent that the decision of the United States Circuit Court of Appeals, adopting a construction of Ordinance 44, of the Series of 1890, which is the basis of the entire controversy, most unfavorable to the public, is contrary to the decisions of other courts of appeals and to other decisions of this Court of Appeals, and to

the decisions of this honorable court, and particularly to the decisions of

Charles River Bridge Co. vs. Warren Bridge, 11 Pet., 420;

Hamilton Gas Light Co. vs. Hamilton, 146 U. S., 258;

Blair vs. Chicago, 201 U. S., 400;

Knoxville Water Co. vs. Knoxville, 200 U. S., 22;

Cleveland Elec. Ry. Co. vs. Cleveland, 204 U. S., 116;

Freeport Water Co. vs. Freeport, 180 U. S., 587;

Cedar Rapids Gas Light Co. vs. Cedar Rapids, 223 U. S., ——;

Clay Center vs. Light & Power Co., 78 Kan., 390; 212 U. S., 564;

and that the court's holding that the city is by implication restricted in its power to provide itself with a water supply, by limiting such supply to one particular plant, is contrary to the decision of this court in

Joplin vs. Light Co., 191 U. S., 150;

Knoxville Water Co. vs. Knoxville, 200 U. S., 22;

and that the court's holding that the bill and cross-bill state facts constituting the impairment of the obligation of a contract is contrary to

St. Paul Gas Light Co. vs. St. Paul, 181 U. S., 142;

Dawson vs. Columbia Trust Co., 197 U. S., 178;

and the action of the court in enjoining the city from taking any steps toward constructing a municipal plant, in the absence of any contention that it has agreed not to erect a competing plant or to grant an exclusive contract, is contrary to

Hamilton Gas Light Co. vs. Hamilton, 146 U. S., 258;

Skaneateles W. W. Co. vs. Skaneateles, 184 U. S., 354;

Water Works Co. vs. Owensboro, 200 U. S., 38;

and the court's holding that The New York Trust Company had the right to maintain the bill is contrary to

Dawson vs. Columbia Trust Co., 197 U. S., 178;

Corbin vs. County of Black Hawk, 105 U. S., 659;

Shoecraft vs. Bloxham, 124 U. S., 730.

Permitting a suit in equity to be brought, and not remanding the parties to their action at law, is contrary to

New York Guaranty Co. vs. Memphis Water Co., 107 U. S., 205.

The court's holding that sections 11 and 12 state an agreement on the part of the city either to purchase or to renew is contrary to

Cedar Rapids Water Co. vs. Cedar Rapids, 223 U. S., ——;

Castle Creek Water Co. vs. Aspen, 146 Fed., 8,

wherein it was held that such provisions are a promise on the part of the company and not on the part of the city

and to Clay Center vs. Light & Power Co., 78 Kan., 390,

wherein it was held that such an agreement was void under a statute similar to ours limiting the period for which franchises might be granted.

The court's holding that the franchise and contract set forth in Ordinance 44 of 1890 might be renewed for twenty years, when section 5, being the rate provision thereof, had been declared unenforceable, is contrary to

Freeport Water Co. vs. Freeport, 120 U. S., 587;

Knoxville Water Co. vs. Knoxville, 189 U. S., 434.

The court's failure to declare the order granting the temporary injunction void was contrary to

Ex Parte Metropolitan Water Co., 220 U. S., 539.

And your petitioners are advised, and Hon. Jacob Trieber, district judge, now presiding at the final hearing of the said causes in the District Court of the United States for the District of Colorado, has ruled, that the said decision and decree of the Circuit Court of Appeals, as to all and every the matters and things therein contained, is final, and that the law as laid down by that court is the law of the case and *res judicata*, not only on the final hearing of the cause in the District Court, but also in the

Circuit Court of Appeals and your honorable court, and that the decision of your honorable court in Metropolitan Water Co., Appellant, vs. Kaw Valley Drainage District et al., decided February 19, 1912, and reported in 223 U. S., 519, denies the right to have the final decision of the District Court reviewed by this court, notwithstanding the principal question involved in the case is based upon the Federal Constitution, for the reason that as to such constitutional question the decision of the District Court must necessarily follow that of the Court of Appeals hereinabove referred to: wherefore the only method by which your petitioners can have the constitutional matters, decided by the Court of Appeals, examined by this court is by writ of certiorari.

If the decision of which your petitioners complain shall be permitted to stand, and if it shall be that under the decision of this court in Metropolitan Water Co. vs. Kaw Valley Drainage District, 223 U. S., 519, the matters and things decided by the Court of Appeals cannot be reviewed by this court or by any other court on an appeal or otherwise from the final decree of the District Court, it will as a precedent result in the establishment of legal principles wholly inconsistent with those announced by this honorable court, and be productive of great injury and injustice, not only to the City and County of Denver and the inhabitants thereof, but to all people similarly situated, where controversies have arisen or may arise between municipal corporations, on the one hand, and public-service corporations holding franchises by grants from such municipalities, on the other, and where contracts have been entered into between them, and grants made, in the light of the

law laid down by this honorable court, and other courts following it, in a long and unbroken line of decisions since Charles River Bridge Co. vs. Warren Bridge, 11 Peters, 420.

Wherefore your petitioner prays that a writ of certiorari be issued under the seal of this court, directed to the United States Circuit Court of Appeals for the Eighth Judicial Circuit, commanding said court to certify and send to this court, on a day to be designated, a full and complete transcript of the record and all proceedings of said court had in said cause, to the end that this cause may be reviewed and determined by this honorable court, as provided by the act of Congress approved March 3, 1891, and that said decree of the Circuit Court of Appeals be revised by this honorable court, and for such further relief as may seem proper.

And your petitioner will ever pray

CHARLES S. THOMAS,
HENRY A. LINDSLEY,
City and County Attorney,
By Chas. S. Thomas,
CHARLES W. WATERMAN.
Solicitors for Petitioners.

W. H. BRYANT,
GEO. L. NYE,
WM. P. MALBURN,
GEO. Q. RICHMOND,
WM. A. JACKSON.
Of Counsel.

State of Colorado, City and County of Denver, ss.

Charles W. Waterman being first duly sworn, on oath deposes and says: that he is one of the solicitors for the above petitioners; that he has read the foregoing petition by him subscribed, and that he knows of the above proceedings had, and that the facts stated in said petition are true to the best of his knowledge and belief.

CHARLES W. WATERMAN.

Subscribed and sworn to before me a notary public this 3rd day of May, A. D. 1912.

My commission expires Apr. 3, 1915.

JOHN A. GALLAHER.
Notary Public

(SEAL)

Nos. ~~821 & 1102~~
642 & 643

In the Supreme Court of the United States

OCTOBER TERM, 1911.

Supreme Court, FILED.
MAY 13 1912
ASKEN

THE CITY AND COUNTY OF DENVER, A MUNICIPAL CORPORATION; ROBERT W. SPEER, AS MAYOR OF SAID CITY AND COUNTY OF DENVER; BURT F. DAVIS, AS CLERK OF SAID CITY AND COUNTY OF DENVER; ALBION K. VICKERY, AS AUDITOR OF SAID CITY AND COUNTY OF DENVER; ARMOUR C. ANDERSON, EDWIN VAN CISE AND A. LINCOLN FELLOWS, AS MEMBERS OF AND CONSTITUTING THE PUBLIC UTILITIES COMMISSION OF SAID CITY AND COUNTY OF DENVER; ELLIS MEREDITH, A. E. MAUFF AND HARRY PETRIE, AS MEMBERS OF AND CONSTITUTING THE ELECTION COMMISSION OF SAID CITY AND COUNTY OF DENVER,
PETITIONERS,

vs.

THE NEW YORK TRUST COMPANY, A CORPORATION; THE DENVER UNION WATER COMPANY, A CORPORATION, AND THE SOUTH PLATTE CANAL AND RESERVOIR COMPANY, A CORPORATION,
RESPONDENTS;

AND

THE CITY AND COUNTY OF DENVER, A MUNICIPAL CORPORATION; ROBERT W. SPEER, AS MAYOR OF SAID CITY AND COUNTY OF DENVER; BURT F. DAVIS, AS CLERK OF SAID CITY AND COUNTY OF DENVER; ALBION K. VICKERY, AS AUDITOR OF SAID CITY AND COUNTY OF DENVER; ARMOUR C. ANDERSON, EDWIN VAN CISE AND A. LINCOLN FELLOWS, AS MEMBERS OF AND CONSTITUTING THE PUBLIC UTILITIES COMMISSION OF SAID CITY AND COUNTY OF DENVER; ELLIS MEREDITH, A. E. MAUFF AND HARRY PETRIE, AS MEMBERS OF AND CONSTITUTING THE ELECTION COMMISSION OF SAID CITY AND COUNTY OF DENVER,
PETITIONERS,

vs.

THE DENVER UNION WATER COMPANY, A CORPORATION, AND THE NEW YORK TRUST COMPANY, A CORPORATION,
RESPONDENTS.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF OPPOSING PETITION FOR WRIT.

(WITH SUPPORTING AFFIDAVIT ATTACHED.)

GERALD HUGHES,
CLAYTON C. DORSEY,
Solicitors for Respondents, The Denver Union Water Company and The South Platte Canal and Reservoir Company.

JOEL F. VAILE,
HENRY MCALLISTER, JR.,
Solicitors for Respondent, The New York Trust Company.

Smith-Brooks [redacted] Press, Denver.

INDEX

PAGE

PREFACE 1
ARGUMENT 3
I. No Power to Issue Writ 3
II. The Writ Should Not Issue 10
III. The Injunction Not Void 16
IV. Conclusion 26
AFFIDAVIT SUPPORTING BRIEF 28

TABLE OF CASES.

American Cons. Co. vs. Jacksonville Co., 148 U. S., 372, 380 ..... 4, 8, 10
Aspen Mining & Smelting Co. vs. Billings, 150 U. S., 31 15
Attorney General vs. Detroit, 112 Mich., 145 ..... 21, 23
Britton vs. Steber, 62 Mo., 370 21
Brock vs. Bruce, 58 Vt., 261 22
Brown vs. Alton Water Co., 222 U. S., 325 ..... 7, 14, 15
City & County of Denver vs. New York Trust Co., 187 Fed., 890 ..... 2, 5
City Railway Co. vs. Citizens Ry. Co., 166 U. S., 557, 562 5
David vs. Portland, 14 Ore., 98 ..... 21, 23
Devine vs. Los Angeles, 202 U. S., 313, 333 5
Ex parte Metropolitan Water Co., 220 U. S., 539 24
Ex parte Wiley, 54 Ala., 226, 228 22
Fields vs. United States, 205 U. S., 292, 296 ..... 10, 11
Forsyth vs. Hammond, 166 U. S., 506, 513, 514 ..... 9, 10
Hilts vs. Arnold (Colorado, unreported) 22
Holy Trinity Church vs. United States, 143 U. S., 457, 459 18
In re Lau Ow Bew, 141 U. S., 583, 587 10
Knoxville Water Co. vs. Knoxville, 200 U. S., 23, 32 5
Lewis vs. Alton Water Co., 212 U. S., 581 15
Mayor of Rutherford vs. Swink, 96 Tenn., 564 19
Metropolitan Water Co. vs. Kaw Valley District, 223 U. S., 519 ..... 7, 14, 15
North American Storage Co. vs. Chicago, 211 U. S., 306, 314 5
People vs. Conover, 17 N. Y., 64, 67 22
People vs. Curley, 5 Colo., 412 ..... 21, 22, 23
Robinson vs. Caldwell, 165 U. S., 359 15
State vs. Burns, 38 Fla., 367 22
State vs. Dillon, 90 Mo., 229 21
State vs. Valle, 41 Mo., 29 21
The Conqueror, 166 U. S., 110, 114 13
Third St. etc. Ry. Co. vs. Lewis, 173 U. S., 457, 460 5
United States vs. Dickinson, 213 U. S., 92, 99, 100, 102 ..... 4, 6, 9

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

THE CITY AND COUNTY OF DENVER, A MUNICIPAL CORPORATION; ROBERT W. SPEER, AS MAYOR OF SAID CITY AND COUNTY OF DENVER; BURT F. DAVIS, AS CLERK OF SAID CITY AND COUNTY OF DENVER; ALBION K. VICKERY, AS AUDITOR OF SAID CITY AND COUNTY OF DENVER; ARMOUR C. ANDERSON, EDWIN VAN CISE AND A. LINCOLN FELLOWS, AS MEMBERS OF AND CONSTITUTING THE PUBLIC UTILITIES COMMISSION OF SAID CITY AND COUNTY OF DENVER; ELLIS MEREDITH, A. E. MAUFF AND HARRY PETRIE, AS MEMBERS OF AND CONSTITUTING THE ELECTION COMMISSION OF SAID CITY AND COUNTY OF DENVER,

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PETITIONERS,

vs.

THE DENVER UNION WATER COMPANY, A CORPORATION, AND THE NEW YORK TRUST COMPANY, A CORPORATION,

RESPONDENTS.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF OPPOSING PETITION FOR WRIT.

The respondents, The New York Trust Company, The Denver Union Water Company and The South

Platte Canal and Reservoir Company, have been notified that on Monday, the 13th day of May, 1912, the petitioners will submit a motion for the issuance of a writ of certiorari to review the opinion of the Circuit Court of Appeals for the eighth circuit, rendered on May 19th, 1911, upon an appeal from interlocutory injunctions granted by the United States Circuit Court for the District of Colorado in September, 1910.

City and County of Denver vs. New York Trust Co., 187 Fed., 890.

In this litigation the interests of the respondents joining in this brief, are not identical. The suit was instituted in the circuit court by the New York Trust Company, and The Denver Union Water Company (a defendant to the bill) filed its cross-bill therein. By these pleadings different relief is prayed for, and the complainant and cross-complainant therein have been and are represented by their own solicitors. Inasmuch, however, as they are joined as respondents in this proceeding, and the petitioners seek from the court a writ of certiorari which will review the opinion affirming orders granting the complainant and cross-complaint separate injunctions, it seems proper, in the interest of brevity, that the Trust Company and the Water Company (and its subsidiary, the South Platte Company) join in filing a brief in opposition to the granting of the writ.

The petition for certiorari, and the brief supporting the same, were not served upon these respondents until late on the 3rd day of May, 1912, and no intimation had been previously received that this action would be taken. In order that this brief may be pre-

sented to the court when application is made, it must be forwarded from Denver not later than the morning of Thursday, the 9th of May, 1912. It is therefore impossible, even if permissible, to discuss the merits of the controversy or to present in brief form the very extended arguments thereon, both by briefs and orally, which were addressed to the Circuit Court of Appeals, and after the consideration of which, that learned court rendered its opinion. Furthermore, it is our understanding that a discussion of the substantial questions in the case is not proper at this stage of the proceedings, and that the principal function of a brief opposing the issuance of the writ is to point out (a) that the granting of the writ to review the opinion in question is not authorized by the Act of Congress entitled "An Act to codify, revise and amend the laws relating to the judiciary," approved March 3, 1911 (hereinafter called the Judicial Code); or (b) that even though the power to issue the writ existed, the case is not one justifying its exercise. To these questions we shall first address ourselves.

I.

Jurisdiction over this controversy does not depend upon diversity of citizenship alone. A constitutional question is presented by the bill and therefore the suit is not one wherein the decree of the Circuit Court of Appeals is made final by the judicial code. Consequently, the power to issue the writ does not exist.

The writ of certiorari prayed for by the petitioners is the writ authorized to be issued in certain cases

under the Act of March 3, 1891 (26 Stat. at Large, p. 828, Sec. 6) as superseded in this respect by Section 240 of the Judicial Code (36 Stat. at Large, Part 1, p. 1157); and it is sought thereby to secure a review by this court of errors alleged to have been committed by the Circuit Court of Appeals for the eighth circuit.

We may therefore lay out of consideration Section 716 of the Revised Statutes as carried forward in Section 262 of the Judicial Code, and empowering the court to issue writs "which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law," as this court has held that a writ of certiorari cannot be issued under this authority for the correction of errors in the lower court.

American Cons. Co. vs. Jacksonville Co., 148 U. S., 372, 380.

U. S. vs. Dickinson, 213 U. S., 92, 99, 100, 102.

A consideration of the pertinent sections of the Judicial Code, which for present purposes may be deemed a re-enactment of the Act of 1891, will demonstrate, we believe, that this court has no power to issue the writ now demanded. And we shall first assume that in a proper case brought within the discretionary power of this court, the writ might issue to review an opinion of the Circuit Court of Appeals on appeal from an interlocutory injunction, in a suit wherein the jurisdiction depended on diversity of citizenship alone.

We preface our argument by the suggestion that the jurisdiction of the national courts in the case at

bar is predicated, by the allegations in the bill, not merely on diversity of citizenship but upon the existence of a federal question, namely, that a certain law referred to in the bill impairs the obligation of a contract, in violation, *inter alia,* of the fourteenth amendment. This appearing upon the face of the bill, necessarily fixes the basis of jurisdiction of the federal courts.

City Railway Co. vs. Citizens Railway Co., 166 U. S., 557, 562.

Third St., etc., Ry. Co. vs. Lewis, 173 U. S., 457, 460.

Devine vs. Los Angeles, 202 U. S., 313, 333.

This question being raised by the bill, endowed the circuit, now district, court with jurisdiction, even though it might ultimately appear that the claim of unconstitutional state action was unfounded.

Knoxville Water Co. vs. Knoxville, 200 U. S., 23, 32.

North American Storage Co. vs. Chicago, 211 U. S., 306, 314.

And the fact that the Circuit Court of Appeals determined that there was a contract which was impaired by a state law, and sustained the jurisdiction on this account, is certainly convincing proof that complainant's contention was made in good faith, and was not merely colorable or fictitious.

City and County of Denver vs. New York Trust Co., 187 Federal, 890.

The constitutional question thus appearing, it is manifest that under the terms of the statute the suit

was not the one wherein the judgment or decree of the Circuit Court of Appeals would be final.

Judicial Code, Secs. 128, 238, 241; 36 Stat. at L., Part I, pp. 1133, 1157.

Has this court the power in such a case, even though the suit were of the extraordinary character requisite for its sparing exercise, to issue the writ of certiorari to review the decree of the Circuit Court of Appeals on an appeal from an interlocutory injunction? The statute measures the court's authority to review errors by certiorari, and whatever may be the supposed importance of the questions involved, the writ will not issue if unauthorized by that Act of Congress.

U. S. vs. Dickinson, 213 U. S., 92, 97, 102.

The statutory provision for the discretionary issuance of the writ reads (the italics being ours):

> "In any case, civil or criminal, in which the judgment or decree of the Circuit Court of Appeals *is made final by the provisions of this Title*, it shall be competent for the Supreme Court to require, by certiorari or otherwise, upon the petition of any party thereto, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."

Judicial Code, Sec. 240; 36 Stat. at Large, Part I, p. 1157.

A decree of the Circuit Court of Appeals in the suit at bar was not "made final by the provisions" of

the act. On the contrary, it is expressly provided that "in any case in which the judgment or decree of the Circuit Court of Appeals is not made final by the provisions of this title," there shall be a right of appeal to this court.

Judicial Code, Sec. 241; 31 Stat. at Large, p. 1157.

It will be noticed that the right of the court to issue the writ depends upon whether the decree of the Circuit Court of Appeals is or is not made final *by the provisions of the Act*. This observation makes it entirely unnecessary to consider the effect upon the pending case of the operation of the principles of law announced by this court in *Brown vs. Alton Water Company*, 222 U. S., 325, and *Metropolitan Water Co. vs. Kaw Valley District*, 223 U. S., 519, and preceding cases therein cited. Those decisions turned, not upon the question whether the Act of Congress rendered the decisions of the Circuit Court of Appeals final, but upon the effect of the procedure taken in the respective cases whereby the decree of the Circuit Court was compelled by the opinion or mandate of the Court of Appeals. We have no present concern with that question, inasmuch as the court's power to issue the writ prayed for depends upon the finality of a decree of the Circuit Court of Appeals on the merits, as fixed by the statute, not upon questions resulting from the manner in which the proceedings are actually conducted in the courts below.

It seems clear that whatever may be the power of this court to grant the writ of certiorari to review the action of a Circuit Court of Appeals upon an ap-

peal from an interlocutory injunction in a controversy where the jurisdiction of the court is founded only on diversity of citizenship (and therefore the judgment or decree of the Circuit Court of Appeals on the merits is made final by the Act), such power does not exist where the suit is of such character that the decree therein entered by the Court of Appeals at final hearing is not made final by the statute, and this position is, we believe, clearly evidenced by this court's decision in

American Cons. Co. vs. Jacksonville Co.,
148 U. S., 372.

That case is the only decision of this court, within our knowledge, discussing at any length the right to review by certiorari the action of a Circuit Court of Appeals on an appeal from an interlocutory order. That was a case resting only on diversity of citizenship, and wherein the decree of the Circuit Court of Appeals was, by the act, *made final*, and this court expressly refers to this circumstance in at least two portions of its opinion (pp. 382, 385). On the latter page Mr. Justice Gray said:

> "The only restriction upon the exercise of the power (to grant the writ) of this court, independently of any action of the Circuit Court of Appeals in this regard is *to cases 'made final in the Circuit Court of Appeals,'* that is to say, to cases *in which the statute makes the judgment of that court final*, not to cases in which that court has rendered a final judgment. Doubtless, this power would seldom be exercised before final

> judgment in the Circuit Court of Appeals, and very rarely indeed before the case was ready for decision upon the merits in that court. But the question at what stage of the proceedings, and under what circumstances, the case should be required, by certiorari or otherwise, to be sent up for review, is left to the discretion of this court, as the exigencies of each case may require."

This language was used for the purpose of establishing the right of the court to grant the writ even before final judgment, *in a case where the decree of the Circuit Court of Appeals on an appeal from a decree on the merits would be final* (as was the suit then before the court), but conversely it would seem to be equally conclusive upon the proposition that where such a decree, when reached and entered, would not be made final by the statute, the right to grant the writ was not conferred. It is hardly necessary to add that the provisions of the Judiciary Act there construed are substantially identical with the terms of the Judicial Code.

The same limitation respecting the issuance of the writ was later repeated in

> Forsyth vs. Hammond, 166 U. S., 506, 513, 514.

We therefore earnestly contend that even though this were otherwise a proper case for the granting of the writ, the Act of Congress does not permit it to be done.

> U. S. vs. Dickinson, 213 U. S., 92, 102.

II.

Even though the power to issue the writ existed, the case is not one justifying its exercise.

This court has frequently announced that as the Judiciary Act establishing the Circuit Court of Appeals was intended to relieve the Supreme Court of the over-burden of cases, the power to issue the writ of certiorari in certain designated cases should be very sparingly exercised and with great caution, and only in cases affecting the interests of the nation or of great and general public importance, or wherein a decision by this court might settle conflicts between two or more Courts of Appeal or between the national courts of appeal and the state appellate tribunals.

In re Lau Ow Bew, 141 U. S., 583, 587.

American Cons. Co. vs. Jacksonville Ry., 148 U. S., 372, 382.

Forsyth vs. Hammond, 166 U. S., 506, 513.

Fields vs. United States, 205 U. S., 292, 296.

A fortiori are these principles applicable to an application seeking a review of an opinion of a Circuit Court of Appeals on an appeal from an interlocutory injunctive order. In *American Cons. Co. vs. Jacksonville Ry.*, 148 U. S., 372, 384, the court, after stating the foregoing general rules respecting the exercise of the discretionary power, said:

> "There are much stronger reasons against the interposition of this court to review a decree made by the Circuit Court of

> Appeals on appeal from an interlocutory order, than in the case of a final decree."

The instant case presents none of these requisite features. There was no diversity of opinion among the three learned judges who sat in the Circuit Court of Appeals and who joined in the opinion. No conflict between the opinions or decrees of federal or state courts arises therefrom. No construction of important national legislation was involved. The interests of the United States or the general public are in no sense concerned. The court was merely called upon to construe a contract made by the City of Denver in its proprietary capacity relative to its water supply, and to determine whether such contract was impaired by a subsequently enacted charter provision of the City and County of Denver having the force and effect of a law, and "however important the case may be to the applicant, the question involved is not one of gravity and general importance."

> Fields vs. United States, 205 U. S., 292, 296.

It is respectfully submitted that had the petition for the writ been presented with that reasonable diligence so essential to good faith, it should and would have been denied.

But the circumstances of this case present such patent laches upon the part of petitioners, such conduct evidencing their acquiescence, pending final decree, in the opinion of the Circuit Court of Appeals, and the waiver of any right, even if it existed, to a review of that opinion by certiorari, that though the

court might otherwise be inclined to grant the writ, it should not now do so.

These facts and circumstances are set forth in brief form in the affidavit of one of the solicitors for The New York Trust Company which we take the liberty of appending to this brief.

It will thereby appear that the opinion of the Circuit Court of Appeals now sought to be reviewed, was rendered on May 19, 1911, a year, less only six days, before the present petition is filed. The appellants, now petitioners, availing themselves of the rule of that court, filed a petition for rehearing about July 6th, 1911. About October 10th, 1911, long after the expiration of the period prescribed by the rules for filing such petition, a so-called supplemental petition was tendered for filing, but not filed because the court had directed the entry of an order overruling the original petition. On November 7th the mandates were issued by the Court of Appeals to the Circuit Court and were received and filed in the latter court on November 9th, 1911.

When the opinion was rendered the suit was not at issue in the Circuit Court, but thereafter various proceedings were had in that court respecting the pleadings and looking to the completion of the issues, and in the month of October they were closed by the filing of the general replications.

After the mandates were filed in the Circuit Court, many conferences were held by the solicitors for all parties, for the purpose of stipulating to certain facts, and an elaborate statement of such facts was prepared and signed. In December, 1911, and January and February, 1912, extensive testimony was taken before the Examiner, in behalf of the

complainant Trust Company, the defendant City and its officials (the present petitioners), and the cross-complainant Water Company. This testimony and the statement of facts were afterwards filed in the Court, for consideration on final hearing. In the month of March, 1912, the case was set down for final hearing on April 19th, 1912. It was reached for such hearing, before his honor, Judge Jacob Trieber, of the Eastern District of Arkansas, sitting in the United States District Court for Colorado, upon due assignment, on April 23rd, 1912, and beginning with that day and ending with April 27th (only six days before the present petition was served) the hearing was continued without interruption, the solicitors for all parties, including the present petitioners, making elaborate and extended oral arguments. On April 27th, 1912, the cause was submitted to the District Court and taken under advisement.

All of these proceedings were had without objection or protest of any character from the petitioners, and without suggestion or intimation from them that the present application to this court was under contemplation.

Such a state of facts certainly must equitably estop the petitioners from invoking the discretionary power of this court in the premises, and they should be relegated to the rights granted to them by law to be exercised in that orderly progress of the suit which they have encouraged and approved.

It is true that in the case of *The Conqueror,* 166 U. S., 110, 114, the court intimated that while the statute did not fix the time for filing the petition for certiorari, by analogy a party might have the year within which an appeal could be taken. But it was

further stated that the "application should be made with reasonable promptness." In that case, under the facts stated, it was thought that such diligence had been observed. However, while it may be assumed that the power to issue the writ exists if the petition be filed within the year, nevertheless the exercise of the power, being purely discretionary, and at the best to be invoked sparingly and with great caution, should be controlled by the particular facts, and where no reasonable diligence, or any diligence, has been shown, but on the contrary there appears to be a complete waiver of the right to resort to certiorari (if it exists), the application should be denied.

Petitioners' brief (page 2) suggests that the present application is inspired by the decision of this court in *Metropolitan Water Co. vs. Kaw Valley Drainage District*, 223 U. S., 519, as that opinion has, it is claimed, been construed by certain members of the bench and bar. It will be observed that petitioners' solicitors do not announce their concurrence in that construction, nor do they predicate their petition upon that ground. It is merely tentatively suggested as the only possible excuse for their present action.

But even if the correct construction of the *Metropolitan Water Case* be as suggested, that cannot affect the right of petitioners to relief by certiorari. That opinion was announced on February 19, 1912, and was published and in the hands of the bar, long before petitioners voluntarily and without objection, entered upon the final hearing of this controversy. In that decision this court followed *Brown vs. Alton Water Company*, 222 U. S., 325, decided January 9, 1912, over three months before such final hearing; and the *Alton Case* in turn was ruled by *Aspen Mining*

and Smelting Co. vs. Billings, 150 U. S., 31, and *Robinson vs. Caldwell*, 165 U. S., 359, determined in 1893 and 1897, respectively.

But over and beyond this feature, there is nothing in any of the cases above referred to which changes the right of a party to a review by certiorari or the power of this court to grant it. For example in *Brown vs. Alton Water Company, supra*, wherein this court refused to review on direct appeal a decree of a Circuit Court rendered under direction of the Circuit Court of Appeals, there had been an attempt, seasonably made, to secure the review by certiorari of the controlling opinion of the Circuit Court of Appeals, and the application for the writ had been denied.

Lewis vs. Alton Water Co., 212 U. S., 581.

So, in *Metropolitan Water Co. vs. Kaw Valley District*, 223 U. S., 519, there is nothing to indicate that the effect which the ruling of the Circuit Court of Appeals may have upon the future conduct of the case, should be or is taken into consideration by this court in passing upon an application for a writ of certiorari. The granting or refusal of the application still depends (a) upon the power of the court to grant the writ, and (b) where such power exists, then upon the general principles which control the discretion of the court in such cases. This court clearly indicated that the issuance of the writ still remained purely optional, when it stated (223 U. S., 519, 522), what the effect of the ruling of the Court of Appeals would be if the application for certiorari were made and denied. Furthermore, in the same case the court said (page 523) that it was unnecessary to consider when a writ of certiorari may issue to review deci-

sions on interlocutory orders by the Circuit Court of Appeals, in view of the character of that court's judgment and mandate in the case then at bar.

III.

There is no merit in the contention that the injunctions issued by the Circuit Court were void because the applications therefor were not heard and determined by three judges.

That Section 17 of the Commerce Court Act of June 18, 1910 (36 Stat. at Large, p. 557), now found as Section 266 of the Judicial Code, does not control such applications for injunction as were before the Circuit Court in the case at bar, must be manifest from a bare recital of petitioners' failure to invoke the statute at any proper stage of proceedings in either the Circuit Court or the Circuit Court of Appeals. The question was never raised at any stage of the injunction hearing in the Circuit Court. It was not presented to the Circuit Court of Appeals, either by brief or upon oral argument or in the petition for rehearing filed in pursuance of its rules. About October 10th, 1911, after the court had directed the preparation of an order overruling the original and only true petition for rehearing, and long after the time had expired for presentation of such petition, a so-called supplemental petition was tendered for filing, but not filed, wherein the question was first attempted to be injected into the proceedings.

While the mandate from the appellate court was filed in the court below on November 9, 1911, no sug-

gestion has been made by petitioners to that court that the injunctions were irregularly issued or are void.

We do not assert that a void order may be cured by waiver. We do assert that the failure of distinguished counsel to advance their present contention before the proper courts and at the proper time is very cogent evidence that it possesses no merit whatsoever.

And this is true, as we shall now briefly demonstrate.

The terms of section 17 of the Commerce Court Act apply only to interlocutory injunction applications suspending or restraining the enforcement, operation or execution of:

(a) "*Any statute of a State.*"

(b) "By restraining the action of any *officer of such State* in the enforcement or execution of *such statute.*"

The bill presented to the court below in the present case sought neither to restrain the enforcement, operation or execution of any "*statute of the State*" of Colorado, nor to restrain the action of any "*officer of such State*" in the enforcement or execution of any such statute.

1. *The bill did not seek to restrain the operation of a "statute of a state."*

The bill attacked the constitutionality of certain provisions of charter amendment 264a of the City of Denver, which pertains solely to the municipal water supply. Was such a charter provision, local to Denver upon a subject of purely municipal and not state interest, a "statute of the state" within the meaning of the Act? We fully concede that, for the purpose

of raising a federal question, this charter amendment was a "law" which might, and in this case did, impair the obligation of contracts. This court has frequently announced that a municipal ordinance may be such a law within the contemplation of the constitutional prohibition against the impairment of contracts. But an entirely different question is raised by section 17. The term "statute of a state" should be given a broad or a restricted meaning according to its context and the plain intention of Congress. And even if it should be held that the language of section 17 is broad enough to justify the contention of petitioners, nevertheless, if, upon a consideration of the entire act of which it is a part, it is manifest that Congress did not intend to regulate such a case as this, then a narrower significance must be given to the term employed.

> Holy Trinity Church vs. United States, 143 U. S., 457, 459.

The title to the act, which may properly be considered (143 U. S., 457, 462), is in accord with this view. It is

> "An act to create a Commerce Court, and to amend the Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty seven, as heretofore amended, and for other purposes."

Prior to the passage of the act, there had been some popular criticism of injunctions issued by the national Circuit Courts restraining the enforcement by *State officers of State statutes*, particularly in com-

merce cases, and section 17 was designed to control such injunctive orders.

The provision of section 17, that the governor and attorney general of the state must be notified of the application, necessarily supports and requires this conclusion. Can it be conceived that the governor and the attorney general of Colorado should have been notified of the application for an injunction in the present case, which pertained solely to questions affecting the municipal water supply of the City of Denver—a subject over which they had no jurisdiction whatsoever?

The case of Mayor of Rutherford vs. Swink, 96 Tenn., 564; 35 S. W., 554, clearly presents the differentiation between a "statute of a State", as used in the ordinary sense, and a municipal ordinance or regulation. The law there under consideration provided that

> "the repeal of a statute does not affect any right accrued, any duty imposed, any penalty incurred * * * under and by virtue of the statute repealed."

It was held that the code provision applied only to statutes of the State, and not to the repeal of a municipal ordinance, the court saying:

> "It is insisted by appellant that a municipal ordinance is a statute, and that the legislature intended that section 47 of the Code should apply to the repeal of municipal ordinances, the same as to the repeal of the State statute. An ordinance is defined to be 'a rule or regulation adopted by a municipal

corporation.' (And., Law Dict., p. 738). The terms 'by-laws', 'ordinances', and 'municipal regulations' have substantially the same meaning, and are defined to be 'the laws of the corporate district, made by the authorized body, in distinction from the general laws of the State.' They are local regulations, for the government of the inhabitants of the particular place. State vs. Lee, 29 Minn., 451-455; 13 N. W., 913; and cases cited. In the case of Baldwin vs. City of Philadelphia, 99 Pa. St., 170, the court say that an ordinance of the councils of a municipality, though binding upon the community affected by it, is not a 'law,' in the legal sense. It is not prescribed by the supreme power of the state, from which alone a law can emanate, and it is not of general authority throughout the commonwealth. 'The ordinances of a city are to its charter as the statutes of a state are to the constitution.' And., Law Dict., p. 738. A statute is defined to be 'the written will of the legislature, expressed in the form necessary to constitute it a part of the law; an act of legislation; an enactment; a written law.' It is manifest that a municipal ordinance is not a statute, in the sense in which the word 'statute' is used in said section 47, Mill. & V. Code; that it was only intended to apply to the *statutes of the state;* and that the common-law rule still applies in this state to the repeal of municipal ordinances, the same as

it did before section 47 of the code became the law."

As further emphasizing this conclusion is the fact that the term "statute of a state" is employed—and not merely the word "statute."

2. *No action of any "officer of a state" was sought to be restrained.*

But if there were any doubt as to whether charter amendment 264a was a "statute of a State," as that term is used in section 17 of the Commerce Court Act, there can be none that the municipal agents or officers of the City and County of Denver whose acts, sought to be restrained, pertain solely to the matter of a local water supply, are not "officers of the State".

That the individual petitioners, made defendants solely by reason of their functions respecting the furnishing of water to the city, are not such "officers of the State", is proven by all the authorities which have discussed the subject, including those cited in the brief supporting the petition.

1 Dill. on Municipal Corps. (5th Ed.), Sec. 97.

People vs. Curley, 5 Colo., 412.

David vs. Portland, 14 Ore., 98; 12 Pac., 174.

Attorney General vs. Detroit, 112 Mich., 145; 70 N. W., 450.

State vs. Valle, 41 Mo., 29.

Britton vs. Steber, 62 Mo., 370.

State vs. Dillon, 90 Mo., 229; 2 S. W., 417.

State vs. Burns, 38 Fla., 367; 21 So., 290, 295.

People vs. Conover, 17 N. Y., 64, 67.

Ex parte Wiley, 54 Ala., 226, 228.

Brock vs. Bruce, 58 Vt., 261; 2 Atl., 598.

In *People vs. Curley*, 5 Colo., 412, 419, the Supreme Court of Colorado, quoting with approval from Judge Dillon's work on Municipal Corporations, thus distinguished between "State officers" and "municipal officers":

> "It must be borne in mind that there is a legal distinction between State officers, that is, officers whose duties concern the State at large, or the general public, although exercised within defined limits, and municipal officers strictly, whose functions relate exclusively to the particular municipality
>
> "'The administration of justice, the preservation of the public peace and the like, although confined to local agencies, are essentially matters of public concern, while the enforcement of municipal by-laws proper, the establishment of gas-works, of water-works, the construction of sewers and the like, are matters which pertain to the municipality as distinguished from the State at large.' Dillon on Municipal Corporations, Secs. 33, 34, 773."

Petitioners refer to "a very recent, unreported case, entitled Hilts vs. Arnold," wherein, so it is said, the Supreme Court of Colorado has held that under

a constitutional provision prohibiting a member of the legislature from being appointed "to any civil office under this State," a State senator could not be appointed an assessor of a county. We have been unable to find any record of such opinion, and if announced, it was rendered orally and in connection with a preliminary application for supersedeas. But even if such announcement was made it does not militate against our position, or interfere with the same court's previous decision in *People vs. Curley, supra.* A county assessor is a constitutional officer "whose duties concern the State at large, or the general public, although exercised within defined limits," and whose functions are not limited to such matters of purely local interest as municipal waterworks.

In *David vs. Portland,* 14 Ore., 98; 12 Pac., 174, it was held that a water committee appointed by statute to provide a city with waterworks were not "officers under the Constitution," and therefore were not required to take an oath of office as prescribed in the case of such officers.

So in *Attorney General vs. Detroit,* 112 Mich., 145; 70 N. W., 450, cited by petitioners, the court distinguished between a public or State officer and one whose duties pertain solely to municipal matters, such as water supply, saying (112 Mich., 147):

> "Many cases have arisen upon similar provisions of the various constitutions, and, while the decisions are not altogether uniform, we shall find them in substantial harmony upon two propositions, viz.: First, that an officer of a city, whose duties are simply and purely municipal, and who has no function pertaining to State affairs, does

> not come within the constitutional descrip- of officers holding office under the State; and, second, where officers in cities are appointed or elected by the community in obedience to laws of the state which impose duties upon them in relation to State affairs, as contradistinguished from affairs of interest to the city merely, such as relate to gas-works, sewers, waterworks, public lighting, etc., they are upon a different footing, and may properly be said to hold office under the State."

Ex parte Metropolitan Water Co., 220 U. S., 539, is cited by petitioners. But in that case it was pointed out that the suit was brought both to enjoin the enforcement of a *State statute* and to restrain the action of a *State officer*. This is shown in the following excerpt from this court's opinion (pp. 543, 544), the italics being ours:

> "In the opinion delivered by the court below in passing upon the question of the proper construction of the foregoing section the nature of the suit brought by the Water Company was thus concisely and accurately stated:
>
> "'That these proceedings are for the purpose by injunction of restraining *the enforcement of the state statute*, I have no doubt. It is alleged that such state statute is absolutely void as being in conflict with both the state and National constitutions. The prayers are in effect that the statute be decreed void. Neither have I any doubt that

the action is *to restrain the action of an officer of the State of Kansas, namely, the Governor.* This is so because the state statute in question provides that when the Governor issues his proclamation, which he has done, *he shall at once take possession of the property either in person, or he may designate the officers of the drainage board to take such possession for him and in his name, but such officers of the drainage board to act as agents of the Governor.* Therefore, I am of the opinion that the congressional statute is directly involved. And the question remains, shall this court now halt these proceedings, or shall other judges be called in to take control of the cases.' "

Section 17 of the act requires notice of the application for injunction to be served on the Governor and Attorney General, thereby plainly indicating that those officials are charged with the duty of resisting the application. But neither of those officers has, in fact or in law, any interest whatsoever in the suit at bar.

3. *The question is now a moot one.*

Section 17 requires that applications for interlocutory injunctions in suits brought to restrain the enforcement of a statute of a State by restraining the action of an officer of the state shall be heard by three judges, one of whom must be either a justice of the Supreme Court or a circuit judge. Circuit Judge Hook and District Judges Riner and Reed sat in this court upon the appeal, and their opinion determined that the injunction was properly issued.

Petitioners have, therefore, had a hearing before the three judges competent to hear applications for injunctions under section 17 of the Commerce Court Act. True, these judges sat in the Court of Appeals and heard the case on appeal, but it was not necessary (even if permissible) that the application be before the Circuit *Court*. Three qualified judges sitting in chambers have the power under section 17 to hear and determine the application.

In addition, as heretofore shown, the cause has progressed to final hearing, and has been submitted to the District Court for final decree. Under these circumstances this court should not interpose at the instance of suitors who have carefully avoided raising the question in a proper manner, even though their contention were meritorious, which, we respectfully but confidently submit, is not the case.

IV.

For reasons previously stated, we have not entered into a discussion of the merits of this litigation or the jurisdictional questions involved therein. All of these were presented at great length to the Circuit Court of Appeals, and they could not, even if time permitted, be compressed into the narrow limits required of this brief. Two learned courts have carefully considered the facts which are only partially and insufficiently covered by petitioners' brief, and have determined that these respondents were entitled to injunctive relief. The opinion of the Circuit Court

of Appeals is fully justified by the record, and is not violative of any principle ever announced by this court. On the contrary, that opinion is in entire harmony with all pertinent decisions of this tribunal.

GERALD HUGHES,
CLAYTON C. DORSEY,
Solicitors for Respondent, The Denver Union Water Company and The South Platte Canal and Reservoir Company.

JOEL F. VAILE,
HENRY MCALLISTER, JR.,
Solicitors for Respondent, The New York Trust Company.

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

THE CITY AND COUNTY OF DENVER, A MUNICIPAL CORPORATION; ROBERT W. SPEER, AS MAYOR OF SAID CITY AND COUNTY OF DENVER; BURT F. DAVIS, AS CLERK OF SAID CITY AND COUNTY OF DENVER; ALBION K. VICKERY, AS AUDITOR OF SAID CITY AND COUNTY OF DENVER; ARMOUR C. ANDERSON, EDWIN VAN CISE AND A. LINCOLN FELLOWS, AS MEMBERS OF AND CONSTITUTING THE PUBLIC UTILITIES COMMISSION OF SAID CITY AND COUNTY OF DENVER; ELLIS MEREDITH, A. E. MAUFF AND HARRY PETRIE, AS MEMBERS OF AND CONSTITUTING THE ELECTION COMMISSION OF SAID CITY AND COUNTY OF DENVER,

PETITIONERS,

vs.

THE NEW YORK TRUST COMPANY, A CORPORATION; THE DENVER UNION WATER COMPANY, A CORPORATION, AND THE SOUTH PLATTE CANAL AND RESERVOIR COMPANY, A CORPORATION,

RESPONDENTS;

AND

THE CITY AND COUNTY OF DENVER, A MUNICIPAL CORPORATION; ROBERT W. SPEER, AS MAYOR OF SAID CITY AND COUNTY OF DENVER; BURT F. DAVIS, AS CLERK OF SAID CITY AND COUNTY OF DENVER; ALBION K. VICKERY, AS AUDITOR OF SAID CITY AND COUNTY OF DENVER; ARMOUR C. ANDERSON, EDWIN VAN CISE AND A. LINCOLN FELLOWS, AS MEMBERS OF AND CONSTITUTING THE PUBLIC UTILITIES COMMISSION OF SAID CITY AND COUNTY OF DENVER; ELLIS MEREDITH, A. E. MAUFF AND HARRY PETRIE, AS MEMBERS OF AND CONSTITUTING THE ELECTION COMMISSION OF SAID CITY AND COUNTY OF DENVER,

PETITIONERS,

vs.

THE DENVER UNION WATER COMPANY, A CORPORATION, AND THE NEW YORK TRUST COMPANY, A CORPORATION,

RESPONDENTS.

AFFIDAVIT OF HENRY MCALLISTER, JR., ONE OF THE SOLICITORS FOR THE RESPONDENT, THE NEW YORK TRUST COMPANY.

State of Colorado, City and County of Denver, ss.

HENRY MCALLISTER, JR., being first duly sworn, on his oath deposes and says that he is, and at all times hereinafter mentioned has been, an attorney at

law, duly admitted to the bars of the Supreme Court of the United States, the Supreme Court of the State of Colorado, the United States Circuit (now District) Court for Colorado and the Circuit Court of Appeals for the Eighth Circuit; and he is, and ever since the commencement in the said Circuit Court of the suit now sought to be reviewed by certiorari in this court he has been, the solicitor for The New York Trust Company, the complainant in said suit, which filed its bill in the said Circuit Court in the month of August, 1910; and he has represented it as such solicitor, not only in the progress thereof in said Circuit, now District, Court, but also on the appeal to the Circuit Court of Appeals for the Eighth Circuit from the orders of injunction entered by the Circuit Court on or about September 6th, 1910. The facts hereinafter stated are based not only upon affiant's personal knowledge of the proceedings which have been taken in said suits in both of said courts, but also upon an examination of the docket of said Circuit Court and information furnished to him by the clerk of the said Circuit Court of Appeals.

The opinion of the Circuit Court of Appeals upon the aforesaid appeal, reported in 187 Federal Reporter, page 890, was rendered on May 19th, 1911. Thereafter and on or about July 6th, 1911, the appellants in said court, to-wit, the City and County of Denver and its officers or agents, filed therein their petition and brief for rehearing. Thereafter and on or about October 10th, 1911, as affiant was and is informed by the clerk of the Circuit Court of Appeals, the said appellants tendered to said clerk for filing a so-called supplemental petition for rehearing, wherein they raised for the first time in either court

the question whether the district judge for the district of Colorado had the power to grant the preliminary injunctions in question, in view of section 17 of the Commerce Court Act. Affiant is informed by such clerk that said supplemental petition was not filed by him for the reason that he had already received a direction from the judges of said court to prepare an order overruling the original petition for rehearing. Such order denying said petition was actually entered upon October 16th, 1911, and affiant is informed by the clerk of said court that the so-called supplemental petition for rehearing was not presented to the judges of said court for the reasons above stated. No further proceedings in said cause were taken in the Circuit Court of Appeals, except that upon November 7th, 1911, mandates were issued therefrom upon the opinion above mentioned, and such mandates were actually received and filed by the clerk of the Circuit Court at Denver, on November 9th, 1911.

Meanwhile, and after the rendition of the opinion of the Circuit Court of Appeals, but prior to the filing in the lower court of the mandates above mentioned, various proceedings were taken in said cause in the Circuit Court, some of which were as follows:

On June 5th, 1911, the complainant and cross-complainant filed their exceptions to a certain cross-bill theretofore filed by the City and County of Denver and others, and on June 28th, 1911, such exceptions came on for hearing before the court and were sustained, and on a demurrer *ore tenus*, the cross-bill was dismissed.

On July 21st, 1911, the complainant filed an amendment to its original and supplemental bills of complaint.

On August 5th, 1911, the defendant City and County of Denver and others, now petitioners herein, filed their demurrer to the said bill and supplemental bill as amended, and on August 25th, 1911, the same came on for hearing, and after argument was overruled.

On September 6th, 1911, the said defendants, now petitioners, filed their separate joint and several answers to the bill as amended and supplemented.

On October 2nd, 1911, the general replications of the complainant to the several answers of the defendants, The Denver Union Water Company, The South Platte Canal and Reservoir Company and the City and County of Denver and others, were filed.

Prior to the last mentioned date the case had also been put at issue upon the cross bill of The Denver Union Water Company.

As above stated, the mandates from the Circuit Court of Appeals were filed in the trial court on November 9th, 1911. Thereafter by stipulation of all parties and by orders of the court, the time for taking testimony in the suit was extended until February 19th, 1912.

During the month of December, 1911, various conferences were had between the solicitors for all parties, including the solicitors for the present petitioners, with respect to a statement of certain facts in the controversy, and in consequence thereof an elaborate statement of those facts was thereafter prepared, signed and filed.

Beginning with December 27th, 1911, and ending February 19th, 1912, many days were spent before the Examiner in Chancery in taking testimony in the suits, the present petitioners being represented by the

same solicitors who are presenting the petition for certiorari to this court, and extended testimony was given, all of which was thereafter certified by the Examiner to the court and filed therein.

On or about March 18th, 1912, the suit was set for final hearing on April 19th, 1912, and notices to that effect were duly mailed to all of the solicitors for the various parties.

On April 23rd, 1912, the cause came on for final hearing in the said District Court, Honorable Jacob Trieber, United States District Judge for the Eastern District of Arkansas, presiding upon assignment; and beginning with that date and ending on April 27th, 1912, extended oral arguments were made, the present petitioners appearing therein as defendants, through their solicitors now representing them upon their application for certiorari; and on April 27th, 1912, the cause was submitted to the District Court and was by it taken under advisement.

Affiant knows that except insofar as the question was attempted to be raised in the Circuit Court of Appeals by the so-called supplemental petition tendered for filing, the present petitioners have never challenged in the said Circuit or District Court, or in the Circuit Court of Appeals, the right of one judge to pass upon the applications for interlocutory injunctions.

Copies of the present petition for certiorari, and the brief in support thereof, were served upon affiant at Denver, Colorado, on the afternoon of Friday, the third day of May, 1912. Never before that time did the present petitioners, or any one for them, suggest

to the said court or to affiant that the making of such application was under contemplation.

And further affiant saith not.

HENRY McALLISTER, Jr

Subscribed and sworn to before me, this 9th day of May, 1912.

My commission expires July 30, 1912.

(Seal) (Sgd) Oliver Dean

Notary Public City and County of Denver.

Receipt of copies of the foregoing brief and affidavit is hereby acknowledged.

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Solicitors for Petitioners.

SUBJECT INDEX.

	Page
STATEMENT	1
1. Purpose of the Petition	1
2. Statement of Case	3
ASSIGNMENT OF ERRORS	8
ARGUMENT	8
1. Does a Contract Exist?	8
2. Was There Any Impairment?	23
3. No Diversity of Citizenship	29
4. No Right in The New York Trust Company to Bring the Suit	30
5. No Equity in the Bill	33
6. The Temporary Injunction Was Void	38

TABLE OF CASES.

American W. W. Co. vs. Home Water Co., 115 Fed., 171 .. 32
Attorney General vs. Detroit, 112 Mich., 145 41
Bienville W. S. Co. vs. Mobile, 175 U. S., 109 24
Blair vs. Chicago, 201 U. S., 400 .... 10, 11
Cedar Rapids Gas Light Co. vs. Cedar Rapids, 223 U. S., — 9
Charles River Bridge Co. vs. Warren Bridge, 11 Peters, 420 9, 10
City of Denver vs. Denver Union Water Co., 41 Col., 77 .. 17
Clay Center vs. Light & Power Co., 78 Kan., 390; 212 U. S., 564 18
Cleveland Elec. Ry. Co. vs. Cleveland, 204 U. S., 116 9
Corbin vs. County of Black Hawk, 105 U. S., 659 33
Dawson vs. Columbia Trust Co., 197 U. S., 178 .... 23, 27, 30
Donahue vs. Morgan, 24 Colo., 389 25
Eau Claire vs. Payson, 107 Fed., 552 32
Ex Parte Metropolitan Water Co., 220 U. S., 39 39
Freeport Water Co. vs. Freeport, 180 U. S., 587 .... 17, 22
Hamilton Gas Light Co. vs. Hamilton, 146 U. S., 258 .. 10, 24
Helena W. W. Co. vs. Helena, 195 U. S., 383 .... 11, 24
Hilts vs. Arnold (Colo.), unreported 41
Joplin vs. Light Co., 191 U. S., 150 .... 11, 22, 24
Knoxville Water Co. vs. Knoxville, 200 U. S., 22 .. 10, 22, 24
Lake County vs. Rollins, 130 U. S., 662 12
Londoner vs. City and County of Denver (Colo.), 119 Pac., 156 41
Long Island W. S. Co. vs. Brooklyn, 166 U. S., 685 .... 11, 25

Page

Long vs. Duluth, 49 Minn., 280 13
Los Angeles vs. Los Angeles Water Co., 177 U. S., 558 .. 22
Los Angeles Water Co. vs. Los Angeles, 103 Fed., 711 .. 19
National Water Works Co. vs. Kansas City, 62 Fed., 852; 65 Fed., 691 19
N. Y. Guaranty Co. vs. Water Co., 107 U. S., 205 .... 32, 33
Peoples G. L. & C. Co. vs. Chicago, 194 U. S., 1 38
St. Paul Gas Light Co. vs. St. Paul, 181 U. S., 142 .. 23, 27
Shawnee Sew. & Dr. Co. vs. Stearns, 220 U. S., 462 29
Shoecraft vs. Bloxham, 124 U. S., 730 33
Skaneateles Water Co. vs. Skaneateles, 184 U. S., 354 .. 24
Slidell vs. Grandjean, 111 U. S., 412 11
State vs. Valle, 41 Mo., 29 41
Stein vs. Bienville Water Co., 141 U. S., 67 11
Syracuse Water Co. vs. Syracuse, 116 N. Y., 167 13
Thomas vs. Grand Junction, 13 Colo. App., 89 13
Vicksburg vs. Vicksburg W. W. Co., 185 U. S., 60 25
Walla Walla vs. Walla Walla W. Co., 172 U. S., 1 25
Water Co. vs. Hutchinson, 207 U. S., 385 25

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

THE CITY AND COUNTY OF DENVER, A MUNICIPAL CORPORATION; ROBERT W. SPEER, AS MAYOR OF SAID CITY AND COUNTY OF DENVER; BURT F. DAVIS, AS CLERK OF SAID CITY AND COUNTY OF DENVER; ALBION K. VICKERY, AS AUDITOR OF SAID CITY AND COUNTY OF DENVER; ARMOUR C. ANDERSON, EDWIN VAN CISE AND A. LINCOLN FELLOWS, AS MEMBERS OF AND CONSTITUTING THE PUBLIC UTILITIES COMMISSION OF SAID CITY AND COUNTY OF DENVER; ELLIS MEREDITH, A. E. MAUFF AND HARRY PETRIE, AS MEMBERS OF AND CONSTITUTING THE ELECTION COMMISSION OF SAID CITY AND COUNTY OF DENVER,

PETITIONERS,

vs.

THE NEW YORK TRUST COMPANY, A CORPORATION; THE DENVER UNION WATER COMPANY, A CORPORATION, AND THE SOUTH PLATTE CANAL AND RESERVOIR COMPANY, A CORPORATION,

RESPONDENTS;

AND

THE CITY AND COUNTY OF DENVER, A MUNICIPAL CORPORATION; ROBERT W. SPEER, AS MAYOR OF SAID CITY AND COUNTY OF DENVER; BURT F. DAVIS, AS CLERK OF SAID CITY AND COUNTY OF DENVER; ALBION K. VICKERY, AS AUDITOR OF SAID CITY AND COUNTY OF DENVER; ARMOUR C. ANDERSON, EDWIN VAN CISE AND A. LINCOLN FELLOWS, AS MEMBERS OF AND CONSTITUTING THE PUBLIC UTILITIES COMMISSION OF SAID CITY AND COUNTY OF DENVER; ELLIS MEREDITH, A. E. MAUFF AND HARRY PETRIE, AS MEMBERS OF AND CONSTITUTING THE ELECTION COMMISSION OF SAID CITY AND COUNTY OF DENVER,

PETITIONERS,

vs.

THE DENVER UNION WATER COMPANY, A CORPORATION, AND THE NEW YORK TRUST COMPANY, A CORPORATION,

RESPONDENTS.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

STATEMENT.

I. Purpose of the Petition.

Petitioners have asked for a writ of certiorari to review a decision of the United States Circuit

Court of Appeals for the Eighth Circuit, affirming orders made by the Circuit Court for the District of Colorado, granting temporary injunctions.

We are prompted to make this application in view of the recent decision of this court in Metropolitan Water Co. vs. Kaw Valley Drainage District, 223 U. S., 519. That decision, in the view of many members of the bench and bar, and among them Judge Trieber (who at the present writing is presiding in the District Court of Colorado at the final hearing of this cause), holds that matters decided by the Court of Appeals on an appeal from a temporary injunction state the law of the case on final hearing not only for the trial court, but also for every other court (including this court) to which the decree of the trial court on final hearing may be appealed from. If such be the true meaning of the Metropolitan Water Case; if the decision of the Court of Appeals on constitutional questions is final because an appeal was taken under the statute to that court from an order granting a temporary injunction, then we are driven to this method of reviewing that decision. The right of direct appeal to this court lies when jurisdiction of the federal court is based upon a constitutional question, as it is in this case; and if we are denied that right on final hearing because the Court of Appeals has passed on those constitutional questions on appeal from an interlocutory order, then we have the right to apply for a writ of certiorari to review the Court of Appeal's decision.

2. *Statement of Case.*

The case is based upon an alleged contract between the city and the Water Company and an alleged impairment thereof by an amendment to the city charter which provided for the construction of a municipal water plant. This contract is not an exclusive one nor is it one in which the city has agreed not to enter into competition with the Water Company. An interlocutory injunction was issued by the District Judge sitting alone restraining the enforcement of the amendment.

A bill was filed in the Circuit Court for the District of Colorado by The New York Trust Company, trustee under a mortgage given by the Denver *Union* Water Company against the City and County of Denver and its officers praying for specific performance of a contract alleged to have been entered into between the former City of Denver and The Denver Water Company, one of the assignors of The Denver Union Water Company. The Trust Company alleged that the city had granted a franchise to The Denver Water Company in 1890, permitting it to use the city's streets, and had made a contract with it, which is found in sections 11 and 12 of Ordinance 44, which are as follows:

> "Sec. 11. At the expiration of the period of twenty years from and after the date of the passage and approval of the ordinance, in case the City shall then elect so to do, the said works may be purchased by the said City, and in case the parties cannot agree, after such election, upon the price to

be paid by the City for the water works of the said Company, its successors and assigns, then their fair cash value shall be determined by arbitration, by five disinterested persons, none of whom shall be residents of Denver, two of them to be chosen by the City, two by the Company, and the fifth by the four first chosen, and in case of failure on the part of the Company to name arbitrators for the period of thirty days after the City shall have named arbitrators and notified the Company so to do, the City may apply to any Court having equity jurisdiction in the County in which the City of Denver shall then be situated for the appointment of two persons of the qualifications aforesaid as such arbitrators, and the Court may thereupon appoint two such persons, who shall act with the same force and effect as if appointed by the Company, and the decision of a majority of said Board shall be final and binding upon both parties, and upon the payment, or tender of payment, by said City the said Company shall convey to said City all of its property, real or personal, easements, rights and privileges, and thereafter all franchises, rights and privileges which have been at any time theretofore granted said Company, its successors or assigns, and which it may then possess, shall cease and be at an end.

Sec. 12. At the expiration of the said period of twenty years the said City may, at its

election, renew the contract hereby made, by ordinance to that effect, for a like period of twenty years, but at a price for hydrant rental 10 per cent less than mentioned in Section 10 hereof, for the period remaining after the ten years after May 1st, 1891, and for successive periods of twenty years at the price last aforesaid, as often and as long as the City may choose. This section is conditioned, however, upon the full performance by the City of the provisions of section 2 hereof."

The Trust Company also alleged that the city had by subsequent acts accepted the offer contained in section 11 above, and was obligated to purchase the property; that it refused to do so, but had adopted charter amendment 264a (which provided for the construction of a municipal plant), subsequent to the expiration of the period covered by Ordinance 44, and had thereby impaired the obligation of its contract with the Water Company, and asked that it be enjoined from taking any further steps toward constructing the municipal plant, and that it be required to specifically perform its contract with the Water Company to purchase its works.

The Denver Union Water Company filed an answer and cross-bill, alleging that sections 11 and 12 of Ordinance 44 contained alternative agreements of the city, one or other of which it was compelled to perform; that it had failed to purchase and pay for the plant of the Water Company, and that the Water Company was therefore entitled to a renewal of its franchise under section 12. The Water Company also

alleged that the adoption of charter amendment 264a impaired the obligation of its contract with the city, and prayed that the city be enjoined from proceeding to construct the municipal water plant provided for therein, and that it be compelled to renew the franchise.

The case came on for hearing in the Circuit Court on the application of the Trust Company and the Water Company for temporary injunctions. It was contended by the City and County of Denver that The New York Trust Company had no right to maintain a bill for specific performance of a contract between other parties; that it could not bring the bill in the federal court as an assignee, the Water Company being a Colorado corporation; that there was no controversy between the Trust Company and the Water Company, and that the Water Company should be aligned with the Trust Company as a complainant, and in such case the requisite diversity of citizenship did not exist; that sections 11 and 12 did not state alternative but independent agreements, each of which was optional with the city to accept; that it had accepted neither, and that there was consequently no contract; that even had there been a contract, there was no impairment of its obligation, but at most a mere refusal to perform; that the bill stated no cause for equitable cognizance, but an action at law, and that no injunction should be issued.

At the hearing in the Circuit Court the pleadings were considered, being the bill, cross-bill and answer of the Water Company, and affidavits which are incorporated in the printed transcript. The injunction was granted, and an appeal taken to the Circuit

Court of Appeals, which merely affirmed the order of the Circuit Court and held that The New York Trust Company had the right to maintain the bill; that, as a federal question was stated, the court had jurisdiction regardless of diversity of citizenship; that sections 11 and 12 of Ordinance 44 contained alternative agreements, under which the city was required to purchase if it did not renew the contract; that it had failed to do either; that in adopting charter amendment section 264a, which provided for the construction of a municipal water plant, it had impaired the obligation of its contract with the Water Company. A petition for rehearing was filed, and later a supplemental petition, in which was raised the question of the validity of the temporary injunction, it having been granted by one judge only, contrary to the provisions of the act which is now section 266 of the Federal Judicial Code. A rehearing was denied.

It will be seen that the Court of Appeals decided the case on different grounds from those set forth in the bill or the cross-bill. The Trust Company alleged that the city had elected to purchase under section 11, but had refused to pay; the Water Company alleged that alternative agreements were stated in sections 11 and 12, one or the other of which the city was required to perform; that it had failed to purchase and pay under section 11, and consequently was obliged to renew under section 12; while the Court of Appeals held that sections 11 and 12 created an obligation on the part of the city to purchase the Water Company's plant, if it did not renew its franchise, but that it had neither agreed to purchase nor renew.

ASSIGNMENT OF ERRORS.

The errors assigned may be grouped generally as follows:

1. The court held that there was a contract on the part of the City and County of Denver to renew its contract with the Water Company, or else it was bound to purchase the company's plant.

2. The court held that there had been an impairment of the obligation of the city's contract with the Water Company, such as is forbidden by the federal Constitution.

3. The court held that it had jurisdiction of the cause regardless of diversity of citizenship.

4. The court held that The New York Trust Company had the right to maintain the bill.

5. The court held that the bill stated a case cognizable in a court of equity.

6. The court failed to consider the supplemental petition for rehearing.

ARGUMENT.

1. Does a Contract Exist?

The main issue in this case is the construction to be given Ordinance 44, and particularly sections 11 and 12 thereof, which are above set forth. Do they constitute a contract on the part of the city to either renew the Water Company's franchise or else to pur-

chase its plant? Or do they permit the city to purchase the works or not, as it may desire, and to renew the contract or not, as it may desire? The construction placed upon these sections by the Circuit Court of Appeals, we contend, is not justified by the canons of construction which have been laid down by this court in a long and unbroken line of decisions, from Charles River Bridge Co. vs. Warren Bridge, 11 Peters, 420, to Cedar Rapids Gas Light Co. vs. Cedar Rapids, decided March 11, 1912, and as yet not officially reported. Those rules are that every ambiguity contained in a public grant must be construed in favor of the public; that if two constructions can be given to the act containing the grant, it must receive the one more favorable to the public.

In construing grants of franchises, this court has recently said:

> "The rules of construction which have been adopted by courts in cases of public grants of this nature by the authorities of cities are of long standing. It has been held that such grants should be in plain language, that they should be certain and definite in their nature and should contain no ambiguity in their terms. *The legislative mind must be distinctly impressed with the unequivocal form of expression contained in the grant*, in order that the privileges may be intelligently granted or purposely withheld."
>
> Cleveland Elec. Ry. Co. vs. Cleveland, 204 U. S., 116-129.

The above merely amplifies

"the established rule that public grants susceptible of two constructions must receive the one most favorable to the public."

Hamilton Gas Light Co. vs. Hamilton, 146 U. S., 258-269.

The rule has also been stated as follows:

"One who asserts private rights in public property under grants of the character of those under consideration must, if he would establish them, come prepared to show that they have been conferred in plain terms; for nothing passes by the grant except it be clearly noted or necessarily implied. * * * It is enough to deny the privilege contended for if upon considering the act the mind rests in doubt and uncertainty as to whether they are intended to be conferred."

Blair vs. Chicago, 201 U. S., 400-463, 467.

As was said in

Knoxville Water Co. vs. Knoxville, 200 U. S., 22-23,

citing

Charles River Bridge vs. Warren Bridge, 11 Pet., 420,

"any ambiguity in the terms of such a contract *'must operate against the adventurers and in favor of the public.'"*

because

> *"it is matter of common knowledge that grants of this character are usually prepared by those interested in them.* * * * This is one among *many* reasons why they are to be strictly construed."
>
> Blair vs. Chicago, 201 U. S., 400-471.

And this is said to be a wise doctrine because

> *"it seems to defeat any purpose concealed by the skillful use of terms to accomplish something not apparent on the face of the act,* and thus sanctions only open dealing with legislative bodies."
>
> Slidell vs. Grandjean, 111 U. S., 412-438.

See also:

> Helena W. W. Co. vs. Helena, 195 U. S., 383-392.
>
> Long Island W. S. Co. vs. Brooklyn, 166 U. S., 685-696.
>
> Stein vs. Bienville Water Co., 141 U. S., U. S., 67-80.
>
> Joplin vs. Light Co., 191 U. S., 150-157.

If the two sections that are supposed to state the contract which has been impaired are ambiguous in their language, no court is justified in giving them an interpretation which works to the disadvantage of the public; and, *a fortiori*, where the intent is clear, where there is no suggestion even from the context

that the city has obligated itself, no such construction can be given to the sections; for otherwise a new rule of law would be created, that while an ambiguous grant will be construed most favorably to the public, yet, where the grant is unambiguous, a construction will be forced upon it which is most unfavorable; in other words, that the public will do better, if it wishes to protect itself against public-service corporations, to couch its grants obscurely, rather than in unquestionable terms. To so hold would be monstrous.

The law where the language of the grant is plain, is thus stated:

> "Where a law is expressed in plain and unambiguous terms, whether these terms are general or limited the legislature should be intended to mean what they have plainly expressed and consequently no room is left for construction."
>
> Lake County vs. Rollins, 130 U. S., 662.

There is no ambiguity in the recitals of sections 11 and 12. One gives the city the option to purchase at the end of twenty years, *if it so elects;* the other, the option to renew the franchise, *if it so elects.* It may do either, if it so elects, and this necessarily carries with it the right to reject both. The Circuit Court of Appeals, conceded that Section 11, standing alone, imposed no obligation upon the city to purchase. It is equally clear that section 12, standing alone, imposes no obligation upon the city

to renew. We are unable to reconcile these facts with the conclusion that, because both are embodied in the ordinance, their combined effect is to impose an obligation upon the city to do one or the other. If it is correct, the old truism that things which are equal to the same thing are equal to each other must be discarded. In its stead we must erect the assertion that reservations which mean nothing when standing alone mean everything when associated in the same instrument, even though that instrument declares them in express terms to be independent of each other, as it does in section 21.

Conceding, for argument's sake, that these sections are capable of two constructions, the authorities quoted require the adoption of that one which is more favorable to the public. And this means that the city should prevail in its contention that it may do the one thing or the other, or neither, if it so determines. And it should be noted that *these sections only reserve rights or options to the city.* Such is the decision of the Court of Appeals in Water Company vs. Aspen, 146 Fed., 8, in construing a section of an ordinance there involved, practically identical with section 11 of Ordinance 44. Nor does such a provision impose any requirement or duty to purchase.

Long vs. Duluth, 49 Minn., 280.

Syracuse Water Co. vs. Syracuse, 116 N. Y., 167-187.

Thomas vs. Grand Junction, 13 Colo. App., 89.

But there is another reason why sections 11 and 12 should not be construed together, and that is be-

cause the parties themselves have expressly provided that they should not be. Section 21, the last section of the same ordinance, states:

> "While the consideration for the respective agreements of the city and the company are upon each side the several agreements of the other, all of the several grants, contracts and agreements in this ordinance contained are to be deemed independent agreements with the same force and effect as if each section of this ordinance was contained in a separate ordinance by itself."

Can anything be clearer than this as to the intent of the parties? In view of these recitals of section 21, to construe sections 11 and 12 as alternative propositions, or to make section 12 dependent upon section 11, or *vice versa*, is to do violence to the intention and purpose of the parties as embodied in the agreement itself.

This alone should be conclusive of the correctness of the construction contended for by those petitioners, and should determine beyond peradventure that sections 11 and 12 are not to be regarded as stating alternative agreements by the city, one or other of which it is obliged to perform, but rather as each being an independent agreement, with the same force and effect as if it were contained in a separate ordinance by itself.

The Denver Water Company was sold under a foreclosure sale in 1894, and its property, together with that of the Citizens' Water Company, which was a competitive organization that had been supply-

ing Denver and its suburbs with water since 1889, and that of some suburban companies, were all merged into The Denver Union Water Company, the cross-complainant.

In 1907 an ordinance was passed by the city and accepted by The Denver Union Water Company, known as Ordinance 163, and set forth on pages 131 et seq. of the printed record. This ordinance provides for a method of submitting the question of the city's acquiring the company's plant *after* an appraisement instead of *before*, as provided in Ordinance 44 of 1890, or to make a new and different contract with the city, and expressly recites that the city may do one or the other, or *neither;* and this was apparently with no idea on the part of either party that the agreements of the city contained in Ordinance 44 as to purchasing or renewing were modified. The property which was to be appraised under Ordinance 163 was much more extensive than that covered by ordinance 44, including all of the property owned *or used* by The Denver Union Water Company, or its allied and auxiliary corporations and associations and persons connected with it, whether the legal title was held by The Denver Union Water Company or some other person, and whether the property, rights and franchises were acquired from The Denver Water Company or from any other person or corporation. Under the provisions of this ordinance, an appraisement was made, but was never voted on, as the ordinance also required a proposition for a new contract to be voted *on at the same election*, such proposition to contain a table of rates to be fixed by the same appraisers. This table of rates they

failed to fix, and reported that they were unable to do so; and hence no election could be or was held.

It was therefore impossible to carry out the plan of settlement provided by Ordinance 163. This ordinance clearly shows, however, what the parties thereto, as late as 1907, understood their legal status under Ordinance 44 was.

We desire to call to the attention of this court the extreme radicalism necessary to give these sections the construction contended for by the Water Company. It is not a mere case of construing the word "may," where it appears in the ordinance, as "must;" for if the city "must" purchase, it "must" also renew. It involves injecting forcibly into the ordinance an entirely new sentence, or possibly an entirely new section, declaring the two sections to be mutually dependent on each other, and that if one is not performed the other shall be. Surely no court is justified in making an entirely new contract between the parties, and even if it did add such provision the contract becomes hopelessly involved.

The contract giving its words their usual common-sense meaning is clear. The city reserves the right to purchase the waterworks system at the end of twenty years, at a valuation to be agreed upon between the parties, or, in event of their failure to agree, to be fixed by appraisers. It also reserves the right at that time to renew the contract *at a lower hydrant rental* than that provided for in the ordinance.

Section 5 reserved to the city the control of rates, and the language of section 12 shows the desire of the

city to retain this control. Those rates were to be fixed by taking an average of the rates in three cities.

When, however, the city attempted to enforce its right, the Water Company contended that provision to be impracticable and unenforcible, and the Supreme Court of Colorado, in City of Denver vs. Denver Union Water Co., 41 Colo., 77 (a suit begun in 1898, but not finally decided until 1907, when the contract had but three more years to run), sustained its contention.

When section 5 of Ordinance 44 of 1890 was declared void and unenforcible by the Supreme Court of Colorado, what was the result on the entire contract? The rate-making power being, as the court has held, a governmental function, and not to be deemed waived by implication (Freeport Water Co. vs. Freeport, 180 U. S., 587) does not the whole contract, based as it necessarily was on this rate provision, become void? How, then, could a void contract be renewed? How could the contract, emasculated by the invalidation of section 5, be renewed without entirely depriving the city of its rate-making power *in invitum?* And how can a contract be renewed when one of the most important terms, if not the most important term, is unsettled? This one feature of Ordinance 44—the declaring unenforcible of the rate provision thereof—would absolutely prevent any renewal of the contract contained therein, even if the city had agreed to renew it.

This would seem to be too clear for argument. Even though each agreement of the ordinance is independent of the others, the table of rates is so essential to any water-supply contract that its elimination would seem to destroy the whole contract just as

much as if the agreement or obligation of the company to supply water were declared void.

We have stated above what we believe to be the true construction of the contract: that the city reserves the right to buy, if it so elects, at the end of twenty years, and the right to renew the contract at a reduced rental, if it so elects, but that in no event is it obligated to do either. The twenty-year period was imposed upon the contract by the city charter. Shortly before the enactment of Ordinance 44 of 1890, the General Assembly of the State of Colorado amended the charter of the City of Denver by providing that

> "all franchises or privileges hereafter granted by the City of Denver to corporations or individuals shall be limited to twenty years from the granting of the same, and such franchises or privileges, so granted, shall plainly specify on what particular streets, alleys or avenues the same shall apply to, and no franchises or privileges shall hereafter be granted by the City of Denver in general terms, or apply to the city generally." (Sess. Laws Colo., 1889, p. 130.)

In Clay Center vs. Light & Power Co., 78 Kan., 390, the Supreme Court of Kansas, where a statutory limitation existed similar to that here involved, forbidding the grant of a franchise for a longer period than twenty-one years and the ordinance provided that

> "if at the expiration of twenty-one years the city shall refuse to grant a further continuance of these privileges the city *shall* purchase," etc.,

the court held the agreement void, because the provision was an indirect attempt to evade the statutory limitation. The ordinance there stated in express terms what in this case it is attempted to have implied. A writ of error was sued out of this honorable court to the Supreme Court of Kansas, but was dismissed. (212 U. S., 564.)

It is held by the Court of Appeals in its opinion that the City Council had power to bind itself in 1890 by contract to purchase the Water Company's plant in 1910. Surely this is a dangerous doctrine. We can find no authority to support such an assumption, and we deny that it exists as a general municipal power, and that any constitutional or statutory warrant existed for its exercise. The only case in which city councils exercised powers similar to this are:

> National Water Works Co. vs. Kansas City, 62 Fed., 852; 65 Fed., 691;
>
> Los Angeles vs. Los Angeles Water Co., 103 Fed., 711;

and in both of these the council acted under express specific authority of the state legislature. Neither of them supports the view that the power exists independently of such authority.

With all respect, we venture to affirm that no such extraordinary and far-reaching power in a municipality should be recognized unless expressly con-

ferred by the General Assembly, or by the Constitution, in unequivocal terms. If the City of Denver could bind itself absolutely to purchase a water plant twenty years hence, it can bind itself to pay twice or ten time its value. It can tie the hands of all succeeding and intervening councils. It can agree to take all extensions, and improvements, together with antiquated or outworn equipment and useless appurtenances. It can make similar contracts with light companies and telephone companies. It can by this means disregard such limitations as existed in the Denver charter upon the power to contract debt in advance of appropriations made therefor. Indeed, it becomes possible through the existence of such a power to mortgage another generation by scores of contracts of purchase and without reference to the public needs.

And if such a power exists, why limit its exercise to twenty years? No reason is perceived for this. The city might with equal power and propriety have agreed to purchase fifty or a hundred years after date, and, because it has power to do so, have also agreed to renew the franchise from time to time until the day of payment arrived. Judge Dillon told us long ago that councils could not conclude their successors by actions such as this, nor exceed the charter limitations upon expenditures, or exercise any authority not specifically imposed or necessarily implied for the requirements of municipal government. The reasons he gave for these fundamental propositions seem quite as convincing in this twentieth century as they did thirty years ago. The authority to make such a contract did not exist, and we trust it

never will be conferred. The foundation of the court's opinion is of sand, for the assumption finds support upon no principle or decision we have been able to discover.

If it be true that our municipalities may contract to purchase an extensive water system twenty years after date thereof, and may utilize the power to neutralize a charter prohibition against the grant of a franchise for a longer period, then they are clothed with an authority most dangerous and menacing to the public welfare. This doctrine must undo what years of judicial decisions have accomplished for the emancipation of cities from venal councils controlled by more venal public-utility corporations. Did no other reason exist to challenge its soundness, the enormity of the abuses to which its exercise is susceptible would be sufficient.

It is true that there are cases upholding the power of a city to contract for a water supply for twenty years at an annual rental, on the ground that such contract is the exercise of the business power of the city, as distinguished from its governmental powers, and hence is no limitation on these governmental powers. But this court does not recognize this distinction when it comes to a limitation on the city's power to acquire its own plant, and the Water Company's contention presents a different case, and is one more like, and indeed practically identical with, so far as its effect on the limitation of a city's powers is concerned, the grant of an exclusive franchise.

The Water Company's position amounts to an allegation of a restriction on the city's power to provide itself with a water supply by limiting such sup-

ply to one particular plant. The grant of the power to limit itself in this respect and the exercise of the power must both appear expressly or by necessary implication.

At least this is the rule laid down in Los Angeles vs. Los Angeles Water Co., 177 U. S., 558, and Freeport Water Co. vs. Freeport, 180 U. S., 587, in regard to contracting away the right to regulate rates, and, *a fortiori*, it must be the rule where the question of acquisition of a waterworks system arises. Needless to say no such grant of power to the city to so limit itself appears in the Constitution of Colorado, the statutes, or the charter of the city, either expressly or by necessary implication.

In Joplin vs. Light Co., 191 U. S., 150, the court said that "the limitation contended for [on the city's right to supply itself with an electric-light plant] is upon a governmental agency;" so we believe it follows that, while making a contract for a supply of water for a period of years may be the exercise of the business power of the city, yet the power to supply itself and its inhabitants with water is a governmental power, "and restraints upon that must not be readily implied." (Joplin case, p. 156.)

The case of Knoxville Water Co. vs. Knoxville, 200 U. S., 22, holds that the power to supply itself with a water supply is conferred upon the city solely for the public good. Where it is claimed, as here, that the city has absolutely bound itself to purchase the Water Company's plant, or to renew its franchise, to the exclusion of any other method of acquiring a water supply, the case becomes identical in principle with the Knoxville case, and should be similarly decided.

2. Was There Any Impairment?

We believe we have demonstrated that no contract exists, or could legally exist, between the City and County of Denver and the Water Company whereby the city is obligated either to purchase the plant of the Water Company or to renew its franchise or contract. But even if the contract alleged did exist, there has been no impairment of its obligation. The Court of Appeals says that

> "the Trust Company says the city elected to purchase and the Water Company says it elected to renew, but the facts are stated upon which these claims are based and it does not appear to us that the city has done either."

Under any possible view of the case, the city has refused to perform, and that is all; it has refused to purchase, or it has refused to renew, or it has refused to act at all. The case is identical in principle with

> Dawson vs. Columbia Trust Co., 197 U. S., 178.
>
> St. Paul Gas Light Co. vs. St. Paul, 181 U. S., 142.

It is held, however, that by adopting charter amendment 264a, which provides for the construction of a municipal plant, the city has placed it out of its power to perform its contract with the Water Company. The Court of Appeals says:

> "By fair construction section 264a seeks to free the city from both of the alternatives, from all obligation to the Water Company;"

and consequently declares that part of it to be void which provides for acquiring a municipal water supply in any other way than as provided in its contract with the Water Company. But if the city was obligated to the Water Company in any way, it is still obligated. Section 264a cannot relieve it in any manner from its obligation; nor can it impair that obligation. If the city has agreed to buy the Water Company's plant, it can be compelled to pay the price in an action at law, even though it had adopted a dozen charter amendments like section 264a. And so if the city is obligated to renew the Water Company's contract, as the Water Company alleges.

The Water Company has no exclusive franchise; and the city has not agreed not to erect a competing plant; hence the case comes under the rule stated in

> Bienville W. S. Co. vs. Mobile, 175 U. S., 109.
>
> Hamilton Gas Light Co. vs. Hamilton, 146 U. S., 258;
>
> Skaneateles Water Co. vs. Skaneateles, 184 U. S., 354;
>
> Joplin vs. Light Co., 191 U. S., 150;
>
> Helena W. W. Co. vs. Helena, 195 U. S., 383;
>
> Knoxville W. Co. vs. Knoxville, 200 U. S., 22;

Water Co. vs. Hutchinson, 207 U. S., 385;
Water Supply Co. vs. Brooklyn, 166 U. S., 685;

and not that followed in

Vicksburg vs. Vicksburg W. W. Co., 185 U. S., 60;
Walla Walla vs. Walla Walla W. Co., 172 U. S., 1.

The right of cities in Colorado to construct a municipal water plant, and at the same time to grant a franchise to a private company, has been recognized by the Supreme Court of this state in

Donahue vs. Morgan, 24 Colo., 389.

But the Court of Appeals says:

> "It is no answer to say that the city may buy one complete system of waterworks and also build another, or may renew a contract entailing the annual payment of a large sum for hydrant service and also build a system of its own 'for all uses and purposes.' It is impossible to believe such an unnecessary waste was intended or was what the electors voted for when they adopted the charter amendment."

We submit the intent of the voters who adopted section 264a is immaterial and does not establish the legal relations between the parties. The duty of the court is to say whether the effect of section 264a as

adopted impairs the obligation of the contract. Does it impair the obligation of the contract to buy? Does it impair the obligation of the court to renew? Does it impair the obligation of the contract to buy or renew? There can only be one answer. If the city was obligated before the adoption of section 264a, to do any of those things, it is still obligated, and section 264a can at the most be construed as a refusal to perform, and as such it constitutes no impairment, under the rule stated in the Dawson and St. Paul cases, *supra*.

But, furthermore, if the city was obligated either to purchase or to renew, it was so obligated prior to the expiration of the contract evidenced by Ordinance 44 of 1890—prior, that is, to April 11, 1910. As it had not performed by that date, *it follows that on the 11th day of April, A. D. 1910, the city's breach of its contract was complete, or else by failing to renew it automatically elected to purchase.* In either event the city's breach occurred and the company's right of action accrued on that day. *No subsequent legislation can alter this fact.*

On May 17, 1910, thirty seven days afterwards, the people enacted section 264a of the charter, which the Court of Appeals declared to be an impairment of the contract, and therefore a violation of the Constitution of the United States. That is to say, a contract theretofore repudiated, thereby investing the injured party with the right of instant appeal to the courts, has been impaired by a charter amendment enacted some time thereafter. If this is a correct exposition of the law, it follows that a contract can be impaired by legislation enacted at any time within

the period of the statute of limitations after breach thereof, without regard to the right of the injured party to invoke the aid of the courts for his protection.

The liability of the city, if any, was absolute when it refused to perform. No subsequent act could thereafter impair the obligation of the contract thus broken. It might attempt to escape liability, but that was fixed in the one or the other direction on the 11th day of April, A. D. 1910.

This court, in Dawson vs. Columbia Trust Company, 197 U. S., 178-181, said:

> "The bill presents a naked case of breach of contract. The first step of the City was to repudiate the contract and refuse to pay. *Whatever it may have done subsequently*, its wrong, if there was a wrong, was complete then."

And in St. Paul Gas Light Co. vs. St. Paul, 181 U. S., 142-149, this court, referring to an ordinance enacted subsequent to the breach, and there asserted to be an impairment of the contract, said of the ordinance:

> "It was but a denial by the City of its obligation to pay and a notice of its purpose to challenge in the future the existence of the duty to make such payment. *This denial, whilst embodied in an ordinance, was no more efficacious than if it had been expressed in any other form, such as by way of answer filed on behalf of the City in a suit brought*

by the Company against the City to enforce what it conceived to be its rights under the contract."

Suppose section 264a had not been adopted, but the council had by ordinance enacted that it would neither buy nor renew, or that it would construct a plant of its own, or that it attempted to grant a franchise to someone else, or the city had contented itself by answer denying the obligation of the contract, or had done nothing at all—must there not, in the judgment of this court, have been just such an impairment of the contract obligation as the amendment of the charter more than a month after the agreement was broken?

Now while Section 264a did provide the exact procedure to be followed by the City and County in acquiring a municipal plant, the municipality did not derive its power to do so from that amendment. Article XX of the Constitution of Colorado, which created the City and County of Denver, and which was adopted in 1902, gave it "the power * * * to construct, condemn and purchase, purchase, acquire, lease, add to, maintain, conduct and operate water works." This again was antedated as to the former city of Denver by the old charter, of which Section 20 of Article 2, as amended by the General Assembly of Colorado and published in Session Laws of 1889, page 124, 128 (approved March 11, 1889), is in part as follows:

> "The City Council * * * shall have power by ordinance: * * * 57. To construct or purchase water works for the use of the city."

This act was effective over a year prior to the enactment of Ordinance No. 44 of 1890, and hence the right of the City to erect its own waterworks existed when Ordinance 44 was passed. The steps taken by the City and County to acquire a municipal plant cannot therefore impair the obligation of the alleged contract of 1890, as this court has clearly stated many times that if the act of a municipality which is claimed to impair the obligation of a contract is done pursuant to statutory authority given prior to the execution of the contract, there is no impairment.

Shawnee Sew. & Dr. Co. vs. Stearns, 220 U. S., 462.

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3. No Diversity of Citizenship.

The bill is brought by The New York Trust Company, a New York corporation, and all the defendants are residents of Colorado. Yet no one can read the bill and the cross-bill filed by The Denver Union Water Company without inevitably coming to the conclusion that this arrangement is merely a collusive and friendly one, adopted for the purpose of giving jurisdiction to the federal court. The Water Company in its cross-bill asks no relief against the Trust Company, and both base their cause of action against the city on the same grounds; i. e., breach of the agreement of the city claimed to be contained in sections 11 and 12 of Ordinance 44 of 1890. It is true the Trust Company alleges that the city is obliged to purchase, and the allegation of the Water Company is that the city is compelled to renew; but it is evi-

dent there is no real controversy between them, and that the Water Company should be aligned with the Trust Company as complainant. It is evident, too, that relief based on either ground will be equally favorable to them, especially to the complainant. The suit is one very similar to that in

> Dawson vs. Columbia Trust Co., 197 U. S., 178,

where the bill was dismissed because under a proper alignment of parties there would not be a controversy solely between citizens of different states. If our previous argument be well grounded, that there is no impairment of the obligation of a contract and no federal question stated, the injunction should have been denied and the bill dismissed.

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4. No Right in The New York Trust Company to Bring the Suit.

The Trust Company by its bill seeks specific performance of the alleged contract to purchase. To this alleged contract it is not in any respect a party. The contract, if any, is between the city and the Water Company. The latter (as well as the city) denies the existence of any such contract and of course claims to be unwilling to bring any proceeding for its enforcement. May the Trust Company maintain such a bill, assuming that a contract to purchase exists?

Its relation to the Water Company is merely that of a trustee in the mortgage made by that company to it—a mortgage covering, among other things, the rights of the Water Company, under Ordinance 44.

Assuming that this mortgage covers the alleged contract to purchase between the city and the Water Company, it is to be kept in mind that the Trust Company is only a conditional assignee of this contract. The contract is the property of the Water Company, which has been pledged to the Trust Company for the benefit of the holders of bonds secured by the mortgage. There has been no default in the mortgage on the part of the Water Company. The bill of the Trust Company alleges none whatever, nor does it allege any breach of duty by the Water Company to the bondholders. It contains no allegation upon which could be predicated any right of foreclosure of the mortgage—much less any right of enforcement of any contract between other parties, both of whom deny its existence.

We have been able to find no authority whatever for the maintenance of a bill for specific performance, of the character of the one here in question, by a party complainant standing in the position of the Trust Company, and we believe there is none.

The Trust Company contends that its right to maintain the bill also arises from the covenants of the mortgage assigning to the trustee therein

> "all the rentals, debts, dues, demands and choses in action of every kind and nature, including water rents, in and by virtue of any contract or contracts, resolution or resolutions, ordinance or ordinances, of the City of Denver," etc.;

that by the deed of trust or mortgage all rights of action thereunder are vested in the trustee; and that in the trust deed it is provided

> "that in case of the purchase of the works and property of the defendant Water Company by the defendant City, as contemplated in and by section 11 of the said Ordinance No. 44 of the Series of 1890,"

all moneys to be paid by the city shall be paid direct to the trustee, who shall thereafter make a call of outstanding bonds, etc.

But the assignment of the rentals, debts, demands, choses in action, etc., by the mortgage merely encumbers them as a part of the security for the bondholders. They are paid to, and owned by, the defendant Water Company, which is not in any respect in default, as mortgagor, and any attempt to collect them, or require their payment direct to the trustee by bill filed against the Water Company, under the circumstances here alleged, would be successfully defended by the latter.

Moreover, even if the Trust Company be deemed an assignee, as distinguished from a mortgagee, of the various rentals, debts, demands, etc., mentioned in the trust deed, it may not maintain this bill on behalf of the bondholders, in a federal court, because its assignor, the Water Company, a citizen of the State of Colorado, could not itself maintain such bill.

> Eau Claire vs. Payson, 107 Fed., 552. (Re-hearing denied, 109 Fed., 676.)
>
> New York Guaranty Co. vs. Memphis Water Co., 107 U. S., 205.
>
> American Water Works & G. Co. vs. Home Water Co., 115 Fed., 171, 175.

The rule is well settled that a suit for the specific performance of a contract is one to recover the contents of a chose in action, and cannot be maintained by an assignee in the federal court, where the assignor could not have maintained it in that court.

Corbin vs. County of Black Hawk, 105 U. S. 659-665.

Shoecraft vs. Bloxham, 124 U. S., 730-735.

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5. No Equity in the Bill.

We have already shown that the bill, while drawn in the form of a pleading in equity, and while praying specific performance, states merely an action against the city for $14,400,000 money due. The case of

N. Y. Guaranty Trust Co. vs. Memphis Water Co., 107 U. S., 205,

was one where certain bondholders filed a bill in equity to recover moneys alleged to be due on a contract which the city had made with the mortgagor, and which was assigned in the mortgage as part of the security for the bonds. The bill was dismissed on one ground that the demand against the city was cognizable at law in the name of the mortgagor. The case is similar in principle to the case at bar, and certainly no refusal of the mortgagor to bring such action would justify a suit in equity against the city by the mortgagee.

But, furthermore, the property for the purchase price of which the suit is brought is not the

property which the city reserved the right to purchase in section 11 of Ordinance 44 of 1890. The allegations of the bill, and particularly in the fifth paragraph thereof, show that the property of nine different corporations are included in the property of the present The Denver Union Water Company. Mr. Robinson's affidavit, which appears on pages 341 et seq. of the printed transcript of record in the Court of Appeals, shows that the plant of The Citizens' Water Company, an entirely independent corporation, which has been operating in South Denver, Colfax, Valverde, Globeville and Barnum, all of which were independent municipalities, but which have since become parts of the City and County of Denver; together with the properties of The Beaver Brook Water Company and The Mountain Water Company, which had been operating in Berkeley, Highlands and Barnum, which municipalities have also since become parts of the City and County of Denver, have subsequent to 1890 become merged with the property of The Denver Water Company, with whom the contract set forth in Ordinance 44 of 1890 was made, and are now all included in the property of The Denver Union Water Company, the cross-complainant in this case; this property being what The New York Trust Company is now trying to compel the city to purchase. By reference to the recital of the pleadings in the case of The Denver Water Company, Appellant, vs. The Citizens' Water Company, Appellee, on pages 436 of seq. of the printed transcript of record in the Court of Appeals, it will be seen that The Citizens' Water Company was a corporation supplying water in the City of Denver

in active competition with The Denver Water Company, as well as supplying water to the outside municipalities named above.

Now, we contend that even if the City of Denver agreed to purchase the plant of The Denver Water Company in twenty years, it did not agree to also purchase everything that any competitive water company which might operate in the City and County of Denver might own or use.

The property which is the subject of this suit includes not only the original property of The Denver Water Company which it held in 1890, and the legitimate extensions and improvements thereto, but also the property of entirely independent corporations (that were engaged in 1890 in supplying waters to municipalities which at that time there was no intention of merging with the City of Denver into the City and County of Denver), and the competitive plant of The Citizens' Water Company. Surely it was not in the contemplation of the parties in 1890 that the city should be required to take all this property; and unless it was, the bill of the Trust Company cannot be sustained.

> Section 11 of Ordinance 44 provides that "at the expiration of the period of 20 years * * * in case the city shall elect so to do, *the said works* may be purchased by the city * * *."

What are these said works? Examining the ordinance carefully, it will be found that this can only refer to the "water pipes, valves, hydrants and apparatus" which the Water Company is granted

the right to lay and maintain in certain streets and public places in the City of Denver, the streets being specified. It is true that in section 2 the city agrees to hereafter, to such extent as it may lawfully do so, grant further rights to the Water Company, but this conveys nothing, as the following law in force at the time of the passage of the ordinance forbids such a grant.

Session Laws of Colorado, 1889, page 130 (City Charter of Denver), provides:

> "Sec. 24. All franchises or privileges hereafter granted by the City of Denver to corporations or individuals shall be limited to twenty years from the granting of the same, and such franchises or privileges so granted shall plainly specify on what particular streets, alleys or avenues the same shall apply; and no franchises or privileges shall hereafter be granted by the City of Denver in general terms or to apply to the city generally."

In 1894, it will be remembered, The Denver Union Water Company, after acquiring the property of all the water companies, competitive or otherwise, which were then supplying water to the inhabitants and municipalities of what became later the City and County of Denver, executed a mortgage on all of this property, which is the same mortgage in which The New York Trust Company is trustee. Section 20 of that mortgage, which appears on page 115 of the printed transcript of record in the Court of Appeals recites:

"In case the City of Denver shall have a right to purchase the works and property of the first party, situated within its corporate limits on the tenth day of April, 1910, and in case of such purchase, if the first party shall be obliged to deliver the property of the first party so purchased to the said City of Denver free and clear of all incumbrances; and it shall be necessary to pay off and redeem the whole of the indebtedness secured by this instrument, it is agreed that all moneys to be received by the said first party from the said City of Denver on account of said purchase shall be payable to the said second party directly from the city and the same are hereby assigned to the said second party for the purposes of the trusts by this instrument created."

Here is a distinct recognition by the complainant and cross-complaintant that the construction above contended for is correct; to-wit, that the property which the city reserved a right to purchase by virtue of section 11 of Ordinance 44 of 1890 was only certain of the property of the company lying within the City of Denver, as it then existed; and yet they come in now and ask that the city be required to take over all of the property of The Denver Union Water Company, whether it be that included within the purview of Ordinance 44 or not, and including the property of The South Platte Canal & Reservoir Co., all of which lies outside of Denver and which is so extensive and so valuable that a bonded indebted-

ness of $4,000,000.00 exists against it. (Cross-bill, p. 6.)

In People's Gas Light & Coke Co. vs. Chicago, 194 U. S., 1, it was held that where the contract claimed to have been impaired was made with one of the several companies merged into the complainant, it affects only the property and franchises originally belonging to the constituent company.

The rule laid down in that case, if applied to the case at bar (and we submit that in all justice it should be), would limit the city's liability, if any exists, to the purchase of the property of The Denver Water Company, and legitimate and reasonable extensions thereof. If that case is a precedent, it would also deny all relief under the present bill, which is too broad in its scope.

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6. The Temporary Injunction Was Void.

The federal question stated in the bill, and the basis of the application of the injunction prayed for, was, as above shown, the alleged impairment of the obligation of the contract between the city and the Water Company by the former in adopting section 264a as part of its charter. Denver is a "home-rule" city and makes its own charter, but of course, unless section 264a is held to be an act of the state, or an act authorized by the state, it does not come within the inhibition of the federal Constitution.

It was held, or at least assumed, by the court that the act was forbidden by the Constitution. If the act then is the act of the state, the officers who are to execute that act must be officers of the state

in the eyes of the court. For how can it be said: "We will take cognizance of these acts of the city, because they are in effect acts of the state, but we will refuse to recognize these officers, who are created by the said act, and whose duty it is to enforce it, as officers of the state"?

Section 266 of the New Federal Judicial Code provides that no interlocutory injunction restraining the enforcement of any statute of a state by restraining the action of any officer of such state shall be issued upon the ground of the unconstitutionality of such statute, unless the same shall be heard and determined by three judges, one of whom at least shall be a justice of the Supreme Court.

In the case at bar the temporary injunction was issued, as the record shows, by one judge alone—the district judge for Colorado. On the hearing on appeal this question was not raised, but in a supplemental petition for rehearing, filed before the Court of Appeals denied the original petition for rehearing, and the gist of which is stated in the petition filed herewith, it was raised and argued at some length. Nevertheless, the Court of Appeals did not consider it. But under the decision of this court in

> Ex Parte Metropolitan Water Co., 220 U. S., 539,

the order of Judge Lewis is *void*, so that there can be no question of waiver. To quote from the opinion in that case:

> "Congress having declared that the merits of the application for an interlocutory injunction such as that applied for in the case with which we are concerned, should

> be considered and determined by a tribunal consisting of three judges constituted as provided in the act, it results that a tribunal not so constituted did not possess jurisdiction over the subject-matter of the right to such injunction. *It follows therefore that in hearing and determining the application for the temporary injunction the single judge acted without jurisdiction and that the order * * * was void.*"

In that case the order made denied the petition for an injunction, and in the case at bar the order granted it, but the reasoning is applicable to both cases; and therefore the Court of Appeals should have declared the order void *suo motu*, even if no supplemental petition for rehearing had been filed.

If section 264a is an act of the state inhibited by the federal Constitution, the officers whose positions are created thereby, *and who are named therein as the persons to fill the said positions*, and whose duties prescribed therein are to perform the very acts which the Court of Appeals declares impair the obligation of the contract, must be officers of the state. Indeed, the Court of Appeals, in its opinion, regards the views of the members of the Public Utilities Commission in executing the provisions of section 264a as one important element in determining that section 264a did impair the obligation of the contract (p. 903).

But even if the Public Utilities Commission had not been created in and by section 264a, and the members thereof had not been named therein, still municipal officers have generally been regarded as

officers of the state. The Constitution of Colorado forbids any member of the legislature being appointed to any state office, and the Supreme Court of Colorado, in a very recent, unreported case, entitled Hilts vs. Arnold, held that the assessor of the City and County of Denver was a state officer, and that a member of the state legislature could not be appointed to that office.

So, too, in Attorney General vs. Detroit, 112 Mich., 145, it was held that, under a somewhat similar constitutional provision, the mayor of Detroit was a state officer.

And in State vs. Valle, 41 Mo., 29, under a somewhat similar constitutional provision, it was held that a member of the Board of County Commissioners of the city of St. Louis held a civil office under the state.

In Londoner vs. City and County of Denver, 119 Pac., 156, the Supreme Court of Colorado said in regard to the charter to which section 264a, in controversy in the case at bar, is an amendment:

> "The charter of the City and County of Denver adopted in obedience to an express mandate of the Constitution of the state, with respect to municipal matters, * * * has all the force and effect of an act of the Legislature."

And section 264a, the act of the city which the Court of Appeals says impairs the obligation of the contract, is not a mere ordinance of the city. It is a part of the charter of the City and County of Denver which was adopted under Article XX of the Consti-

tution of Colorado, and is the fundamental law of the city.

We submit that the decision of the Circuit Court was erroneous, and that the decision of the Circuit Court of Appeals was erroneous, and that the orders granting the interlocutory injunctions were *void*. We therefore pray that, in view of its decision in Metropolitan Water Co vs. Kaw Valley Drainage District, 223 U. S., 519, and the uncertainty arising therefrom as to the rights of these petitioners to have the constitutional and jurisdictional questions considered by the Circuit Court of Appeals reviewed by this court, this court may grant the prayer of the petition and take jurisdiction of this cause, and issue the writ of certiorari, and order the record sent up from the Court of Appeals, and determine the validity of the interlocutory order of injunction, and the jurisdiction of the Circuit Court; and that the interlocutory order of the Circuit Court, and the decree of the Court of Appeals affirming the same, be reversed and set aside.

All of which is respectfully submitted.

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SUBJECT INDEX.

PAGE

STATEMENT 1
The Allegations of the Bill 5
The Allegations of the Cross-Bill 23
The Evidence 33
ASSIGNMENTS OF ERROR 35
ARGUMENT 41
I. Jurisdiction of the Circuit Court 41
1. Diversity of Citizenship 41
2. Federal Question 51
II. The Contract 80
1. The City's Contention 82
2. The Company's Alleged Rights under the Contracts of 1870 and 1874 90
3. Sections 11 and 12 of Ordinance 44 of 1890 92
a. The Canons of Construction Applicable in Case of Municipal Franchises 92
b. The Construction in the Light of Section 21 of the Same Ordinance 104
c. The Construction Contended for by the Companies Would Make the Contract *Ultra Vires* and Void 105
d. The Construction Contended for by the Water Company Would Limit the City's Power to Acquire a Water Plant 114
e. The Construction of the Contract in the Light of Ordinance 163 of 1907 118
f. The Construction of the Contract According to the Natural Meaning of Its Text 120
g. The Construction of the Contract in the Light of Section 20 124
h. "Contemporaneous Construction" of the Contract 125
i. A Practical Objection to the Water Company's Construction: Impossibility of Performance 131
III. The Alleged Impairment of the Contract 132
IV. Due Process of Law 160
V. No Right in the New York Trust Company to Maintain the Suit 164
1. The Trust Company Not a Party to the Contract 164
2. The Trust Company May Not Sue in the Federal Court as an Assignee of a Chose in Action 165
3. The Bill Cannot Be Maintained Because It Is Too Broad 168
4. The Trustee of the South Platte Company Should Be Made a Party to the Bill 179

PAGE

5. Non-Performance of the Alleged Contract on the Part of the Water Company Bars a Suit for Specific Performance 180

6. The Conduct of the Water Company between the Time of the Appraisement under Ordinance 163 and the Commencement of This Suit Estops It to Assert a Right to a Renewal 183

7. No Equity in the Bill....187

VI. The Cross-Bill 188

1. Rights Claimed by the Water Company Based upon Same Facts as Those Set Forth in the Bill....189

2. Rights Claimed by Water Company Not Based upon Alleged Infringements of Its Contract or Franchise....193

3. The Cross-Bill Cannot Be Sustained as a Taxpayer's Bill..201

4. Is Section 264a Void Because It Was Improperly Constructed or Submitted, or is in Conflict with the Constitution of Colorado or Other Parts of the Charter of Denver? 203

5. Is Section 264a Void Because in Conflict with Provisions of the Federal Constitution Other Than Those Relied on in the Bill?....224

VII. The Temporary Injunction Restraining the City from Acting under the Provisions of Section 264a of the Charter Was Granted Improvidently and Contrary to the Federal Statute...224

APPENDIX—

Article XX of the Constitution of Colorado....235

Article XI, Section 8, of the Constitution of Colorado....246

TABLE OF CASES.

PAGE

Arkansas vs. Kansas Co., 183 U. S., 185.... 56
Amer. W. W. Co. vs. Home Water Co., 115 Fed., 171....107, 228
Ayers vs. Chicago, 101 U. S., 184.... 201
Attorney General vs. Amos, 60 Mich., 372.... 205
Austin vs. McCall, 67 S. W. (Tex. Civ. App.), 192.... 221
Attorney General vs. Detroit, 112 Mich., 145.... 230

Boston Mng. Co. vs. Montana Ore Co., 188 U. S., 632.... 54
Bienville Water Supply Co. vs. Mobile, 175 U. S., 109.... 70
Bienville Water Supply Co. vs. Mobile, 186 U. S., 212.... 72, 163
Brummitt vs. Ogden W. W. Co., 33 Utah, 289.... 76
Blair vs. Chicago, 201 U. S., 400....94, 96, 99, 144
Board of Public Ins'n vs. Board of Comm'rs, 58 Fla., 391....218, 221
Barney vs. City of New York, 193 U. S., 430....156, 157
Boise Artesian W. Co. vs. Boise City, 213 U. S., 276.... 198

Corbin vs. County of Black Hawk, 105 U. S., 659.... 49, 166
Continental Sec. Co. vs. Interboro C. R. T. Co., 165 Fed., 945.... 63
Cleveland Elec. Ry. Co. vs. Cleveland, 204 U. S., 116.... 93

PAGE
Charles River Bridge Co. vs. Warren Bridge, 11 Pet., 420 ..... 92, 94
Castle Creek Water Co. vs. Aspen, 146 Fed., 8 101
City and Co. of Denver vs. N. Y. Trust Co., 187 Fed., 890..66, 102, 128, 134
Colby University vs. Canandaigua, 96 Fed., 449 101
City of Denver vs. Hubbard, 17 Colo. App., 346 108
Clay Center vs. Light & Power Co., 78 Kan., 390 112
Clay Center Light & Power Co. vs. Clay Center, 212 U. S., 564 112
Curtis vs. Whitney, 13 Wall., 68 154
Clark vs. Kansas City, 176 U. S., 114 196
Chadwick vs. Kelley, 187 U. S., 540 197
Cross vs. De Valle, 1 Wall., 1 201
Citizens R. R. Co. vs. City R. R. Co., 56 Fed., 746 228
City R. Co. vs. Citizens St. Ry. Co., 166 U. S., 557 141
City of Denver vs. Denver Union Water Co., 41 Colo., 77 .....
.....83, 84, 86, 122, 174, 175, 181

Detroit vs. Dean, 106 U. S., 537 42
Dawson vs. Columbia Trust Co., 197 U. S., 178 .....42, 45, 151, 152, 155
Defiance Water Co. vs. Defiance, 191 U. S., 184 52
Devine vs. Los Angeles, 202 U. S., 313 53
Donahue vs. Morgan, 24 Colo., 389 ..... 76, 150
Duluth vs. Duluth Gas & Water Co., 45 Minn., 210 111
David vs. Portland, 14 Ore., 98 206
Denver vs. Hayes, 28 Colo., 110 215
Denver vs. Hubbard, 17 Colo. App., 346 108
Denver vs. Denver Union Water Co., 41 Colo., 77.83, 84, 86, 122, 174, 175, 181

Equitable Life Assur. Soc. vs. Brown, 213 U. S., 25 63
Eau Claire vs. Payson, 107 Fed., 552 167
Ex Parte Smith, 231 Mo., 111 .....208, 226
Eugene vs. Willamette Valley Co., 52 Ore., 490 .....208, 212
Elyria Gas & Water Co. vs. Elyria, 57 Oh. St., 374 ..... 76, 149
Ex Parte Metropolitan Water Co., 220 U. S., 539 232

Florida Central Co. vs. Bell, 176 U. S., 321 50
Freeport Water Co. vs. Freeport, 180 U. S., 587 .....114, 131
Farmers L. & T. Co. vs. Sioux Falls, 136 Fed., 721 216

Gring vs. Ives, 222 U. S., 365 52
Garrigus vs. Commissioners, 39 Ind., 66 216

Heim vs. Zarecor, 222 U. S., 32 42
Hardin vs. Boyd, 113 U. S., 756 44
Hamilton Gas Light Co. vs. Hamilton, 146 U. S., 258 .....
.....70, 93, 144, 148, 156, 157, 163, 227
Helena W. W. Co. vs. Helena, 195 U. S., 383 .....73, 92, 94, 146, 155
Harris vs. People, 59 N. Y., 599 205
Hilts vs. Arnold (unreported), Colo. Sup. Ct. 230
Home Telephone Co. vs. Los Angeles, 211 U. S., 265 114

In re Borough of Millvale, 162 Pa. St., 364 76
Illinois T. & S. Bk. vs. Arkansas City, 76 Fed., 271 97
In re Burnette, 73 Kan., 609 150
Iron Mountain Co. vs. Memphis, 96 Fed., 113 .....228, 229

Joy vs. St. Louis, 201 U. S., 332 52
Joplin vs. Light Co., 191 U. S., 150 .....71, 95, 115

PAGE

Knoxville Water Co. vs. Knoxville, 200 U. S., 22 ..... 69, 76, 94, 96, 115, 149, 151, 161, 222
Kiernan vs. Portland, 57 Ore., 454 ..... 208, 226
Kiernan vs. Portland, 223 U. S., 151 216

Long Island W. S. Co. vs. Brooklyn, 166 U. S., 685 ..... 74, 95
Lehigh Water Co. vs. Easton, 121 U. S., 388 ..... 76, 163
Lehigh Water Co.'s Appeal, 102 Pa. St., 515 76
Lake Co. vs. Rollins, 130 U. S., 662 99
Long vs. Duluth, 49 Minn., 280 102
Los Angeles vs. Los Angeles W. Co., 88 Fed., 720 111
Los Angeles vs. Los Angeles W. Co., 103 Fed., 711 111
Los Angeles vs. Los Angeles W. Co., 177 U. S., 558 114
Leadville vs. Sewer Co., 47 Colo., 118 117
Lampasas vs. Bell, 180 U. S., 276 197
Louisiana vs. Pillsbury, 105 U. S., 278 205
Londoner vs. Denver, 119 Pac., 156 226
Luther vs. Borden, 7 How., 1 223

Montclair vs. Ramsdell, 107 U. S., 147 205
Moore vs. New Orleans, 32 La. Ann., 726 228
Mercantile Trust Co. vs. Collins Park Co., 99 Fed., 812 228
McCain vs. Des Moines, 174 U. S., 168 ..... 157, 163
Meridian vs. Farmer's Loan & Trust Co., 143 Fed., 67 163

Nat'l Hollow Brake Co. vs. Chicago Ry. Eqip. Co., 168 Fed., 666 47
New Orleans W. W. Co. vs. Louisiana, 185 U. S., 336 52
Newburyport Water Co. vs. Newburyport, 193 U. S., 561 ..... 52, 75, 151
New Orleans vs. Benjamin, 153 U. S., 411 55
Nat'l Water Works Co. vs. Kansas City, 62 Fed., 853 111
Nat'l Water Works Co. vs. Kansas City, 65 Fed., 691 111
New York Guaranty Co. vs. Memphis W. Co., 107 U. S., 205 ..... 167, 187
Nesbit vs. People, 19 Colo., 441 206
Nash vs. Council Bluffs, 174 Fed., 182 216
New Orleans W. W. Co. vs. Louisiana Sugar Co., 125 U. S., 18 227
New Orleans Gas Co. vs. Louisiana Light Co., 115 U. S., 650 191
New Orleans Water Works vs. Rivers, 115 U. S., 674 191

Omaha Water Co. vs. Omaha, 162 Fed., 225 97
Omaha Water Co. vs. Omaha, 147 Fed., 1 97
Omaha vs. Omaha Water Co., 218 U. S., 180 97
Oshkosh Waterworks Co. vs. Oshkosh, 187 U. S., 437 142
Owensboro W. W. Co. vs. Owensboro, 200 U. S., 38 142

People's Gas Light & C. Co. vs. Chicago, 194 U. S., 1 177
People vs. Sours, 31 Colo., 369 ..... 205, 210, 213, 218
Platt vs. San Francisco, 158 Cal., 74 ..... 208, 226
People vs. Angel, 109 N. Y., 564 221
Poppinger vs. Yutte, 102 N. Y., 38 221
Pacific States T. & T. Co. vs. Oregon, 223 U. S., 118 223
Prout vs. Starr, 188 U. S., 537 229
Pennoyer vs. McConnaughy, 140 U. S., 1 229

Removal Cases, 100 U. S., 457 42
Red River Bank vs. Craig, 181 U. S., 548 197
Rudolph vs. Hutchinson, 134 Wis., 283 221

PAGE

Re Newport Charter, 14 R. I., 655 230
Re Borough of Millvale, 162 Pa. St., 364 76

Steele vs. Culver, 211 U. S., 26 42
Stephens vs. Smartt, 172 Fed., 466 47
Shoecraft vs. Bloxham, 124 U. S., 730 ..... 49, 166
St. Joseph, etc., Ry. Co. vs. Steele, 167 U. S., 659 52
Shawnee Sew. & Dr. Co. vs. Stearns, 220 U. S., 462 ..... 52, 153
Skaneateles Water Co. vs. Skaneateles, 184 U. S., 354 .....
.....70, 71, 92, 143, 148, 155, 163, 196
Stein vs. Bienville Water Supply Co., 141 U. S., 67 .....71, 95, 101
Stein vs. Bienville Water Supply Co., 34 Fed., 145 111
Slidell vs. Grandjean, 111 U. S., 412 94
Syracuse Water Co. vs. Syracuse, 116 N. Y., 167 103
St. Paul Gas Light Co. vs. St. Paul, 181 U. S., 142 .....151, 155
Supervisors vs. Stanley, 105 U. S., 305 196
Stuart vs. Hayden, 72 Fed., 402 201
State vs. Riplinger, 30 Wash., 281 .....208, 210, 221
Swann vs. City of Murray, 146 Ky., 148 216
State vs. Allen, 183 Mo., 283 216
State vs. Timme, 54 Wis., 318 218
State vs. Cox, 8 Ark., 436 221
State vs. Curley, 5 Colo., 412 230
State vs. Valle, 41 Mo., 29 230
Shotwell vs. Moore, 129 U. S., 590 141
State vs. Union, 62 N. J. L., 142 150
Seattle Electric Co. vs. Seattle, 185 Fed., 355 162

Tennessee vs. Union, etc., Bank, 152 U. S., 454 56
Third Street Ry. vs. Lewis, 173 U. S., 457 56
Thomas vs. Grand Junction, 13 Colo. App., 80 104
Tyler vs. Court of Registration, 179 U. S., 405 197
Taylor vs. Beckham, 178 U. S., 548 223

Underground R. R. Co. vs. New York, 193 U. S., 416 52

Vicksburg vs. Waterworks Co., 202 U. S., 453 ..... 74, 97

Water, Light & Gas Co. vs. Hutchinson, 207 U. S., 385 .....75, 116, 149, 155
Williams vs. Bruffy, 96 U. S., 176 227
Wellmaker vs. Terrell, 3 Ga. App., 791 150

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

No. 642.

THE CITY AND COUNTY OF DENVER, A MUNICIPAL CORPORATION; ROBERT W. SPEER, AS MAYOR OF SAID CITY AND COUNTY OF DENVER; BURT F. DAVIS, AS CLERK OF SAID CITY AND COUNTY OF DENVER; ALBION K. VICKERY, AS AUDITOR OF SAID CITY AND COUNTY OF DENVER; ARMOUR C. ANDERSON, EDWIN VAN CISE AND A. LINCOLN FELLOWS, AS MEMBERS OF AND CONSTITUTING THE PUBLIC UTILITIES COMMISSION OF SAID CITY AND COUNTY OF DENVER; ELLIS MEREDITH, A. E. MAUFF AND HARRY PETRIE, AS MEMBERS OF AND CONSTITUTING THE ELECTION COMMISSION OF SAID CITY AND COUNTY OF DENVER,
PETITIONERS,

vs.

THE NEW YORK TRUST COMPANY, A CORPORATION; THE DENVER UNION WATER COMPANY, A CORPORATION, AND THE SOUTH PLATTE CANAL AND RESERVOIR COMPANY, A CORPORATION,
RESPONDENTS.

No. 643.

THE CITY AND COUNTY OF DENVER, A MUNICIPAL CORPORATION; ROBERT W. SPEER, AS MAYOR OF SAID CITY AND COUNTY OF DENVER; BURT F. DAVIS, AS CLERK OF SAID CITY AND COUNTY OF DENVER; ALBION K. VICKERY, AS AUDITOR OF SAID CITY AND COUNTY OF DENVER; ARMOUR C. ANDERSON, EDWIN VAN CISE AND A. LINCOLN FELLOWS, AS MEMBERS OF AND CONSTITUTING THE PUBLIC UTILITIES COMMISSION OF SAID CITY AND COUNTY OF DENVER; ELLIS MEREDITH, A. E. MAUFF AND HARRY PETRIE, AS MEMBERS OF AND CONSTITUTING THE ELECTION COMMISSION OF SAID CITY AND COUNTY OF DENVER,
PETITIONERS,

vs.

THE DENVER UNION WATER COMPANY, A CORPORATION, AND THE NEW YORK TRUST COMPANY, A CORPORATION,
RESPONDENTS.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF PETITIONERS.

STATEMENT.

The New York Trust Company, trustee under the mortgage or deed of trust of The Denver Union Water Company, filed its bill of complaint on August

22, 1910, in the Circuit Court of the United States for the District of Colorado, against the City and County of Denver, its mayor, clerk and auditor, its Public Utilities Commission, its Election Commission, The Denver Union Water Company and The South Platte Canal and Reservoir Company.

For brevity, the New York Trust Company will frequently be referred to as the "trust company," the City and County of Denver as the "city" or "defendant city," The Denver Union Water Company as the "water company" or "defendant water company," and The South Platte Canal and Reservoir Company as the "South Platte company".

The purpose of the bill, stated briefly, was to enjoin the issuance of bonds by the city to construct a new municipal water plant, and to compel specific performance by the city of an alleged contract between it and the water company for the purchase of the latter's plant. This alleged contract was predicated on provisions of Ordinance No. 44 of the series of 1890 of the City of Denver, defendant city's predecessor, adopted April 10, 1890 (Record, p. 31).

The defendant, The Denver Union Water Company, on August 25, 1910, filed an answer to the bill, admitting most of its allegations (Record, p. 89). At the same time it filed a cross-bill, making the New York Trust Company and all the other defendants, except the South Platte company, defendants thereto. The cross-bill also sought an injunction restraining the issuance of bonds for the construction of a municipal plant, and prayed a decree that it (the water company) was entitled to a renewal or extension, for another twenty-year period, of its franchise,

which had expired on April 10, 1910, and which was granted by Ordinance 44 of the series of 1890 above referred to (Record, p. 111).

Denver has a "Home Rule" charter adopted under the provisions of Article XX of the constitution of Colorado (see Appendix). An amendment to this charter, designated section 264a (Record, p. 79), authorizing the construction of a municipal plant, had been adopted by the vote of the electors on May 17, 1910, and, pursuant to its provisions, the city council had called an election to be held on September 6, 1910, for the submission to the voters of the question of the issuance of bonds for the construction of such a plant, and the bill and cross-bill were filed on the dates mentioned, shortly before the day set for the election, to enjoin the holding of the election and the issuance of bonds, and for the other relief mentioned.

A hearing was had on August 31, 1910, and subsequent days, solely upon the pleadings mentioned and certain affidavits and documentary matter filed in the cause. No answer or other pleading had then been filed on behalf of the city or its officers. The Circuit Court refused to enjoin the holding of the election, but on September 6, 1910, entered an order of temporary injunction upon the bill, and a like order upon the cross-bill, restraining in each instance the city and its officers from issuing the bonds referred to, or taking any steps whatsoever toward the construction, or putting into operation, of a new and independent municipal water plant (Record, pp. 270, 272). From each of these orders of injunction an appeal was taken on the 21st day of September, 1910,

to the Circuit Court of Appeals for the Eighth Circuit. That court affirmed these orders. (City and County of Denver vs. New York Trust Co., 187 Fed., 890, determined May 19, 1911.) The writs of certiorari granted by this court on May 20, 1912, bring here for review the record which was before the Circuit Court of Appeals upon the appeals mentioned.

The record consists principally of the bill and cross-bill, and the various exhibits attached thereto. These exhibits include Ordinance 44 of the series of 1890 (Record, p. 31), granting the twenty-year franchise of the water company, expiring April 10, 1910, upon which are predicated the contract of purchase asserted by the trust company, and the contract of renewal asserted by the water company; the amendment to the charter of the city, section 264a (Record, p. 79), adopted May 17, 1910, authorizing the issuance of bonds for the construction of a new municipal plant, which the trust company and water company declare impairs the obligations of the alleged contracts; Ordinance No. 163 of 1907 (Record, p. 69), enacted in an unsuccessful attempt to effect a settlement of the so-called water question prior to April 10, 1910, the date of the expiration of the twenty-year franchise, and under which an appraisement of the plant of the water company was had; and also the mortgage or deed of trust of The Denver Union Water Company (Record, p. 42), under which the complainant, the New York Trust Company is trustee, and which it is alleged includes as part of the property mortgaged Ordinance 44 and the rights and privileges thereunder.

Assuming that there is jurisdiction of the cause in a federal court, the principal questions arising upon the record, which presents appeals from orders

of injunction restraining the construction of a municipal plant, are whether there is any contract whereby the city is obligated to purchase the plant of the water company or to renew its franchise and whether, if such contract exists, the provision of section 264a, authorizing the building of a plant by the city, impairs its obligation.

THE ALLEGATIONS OF THE BILL.

The bill alleges that the complainant is a corporation and citizen of the state of New York, and that all the defendants are citizens of the state of Colorado; that the amount in controversy exceeds $5,000, and the suit is one of a civil nature, in equity, arising under the constitution and laws of the United States; that the City and County of Denver is a municipal corporation organized under Article XX of the constitution of Colorado; that the various individual defendants are officers of the city, or members of its Public Utilities Commission or Election Commission; that the defendant, The Denver Union Water Company, is a Colorado corporation, organized on October 18, 1894, and the defendant, The South Platte Canal and Reservoir Company, is also a Colorado corporation (Record, pp. 1-4).

The bill alleges further that prior to October 18, 1894, the date of the organization of defendant water company, there were embraced within the territory of the present City and County of Denver the following municipalities, to-wit, the City of Denver, organized under a special charter, and the towns of

Barnum, Colfax, Harman, Highlands, South Denver, Argo, Berkeley, Elyria, Globeville, Montclair and Valverde, each of which was a municipal corporation organized under the laws of Colorado (Record, pp. 4, 5); that certain corporations had been engaged in supplying these municipalities and their inhabitants with water from the year 1870 until October 18, 1894; namely, The Denver City Water Company, The Denver City Irrigation and Water Company, The Denver Water Company, The Domestic Water Company, The Denver City Waterworks Company, The American Waterworks Company of New Jersey, The Mountain Water Company, The Beaver Brook Water Company, and The Citizens Water Company (Record, p. 4); and that there had been granted to these various companies by the several municipalities, ordinances and contracts, among them Ordinance 44 of the City of Denver, passed April 10, 1890, granting to The Denver Water Company (predecessor of defendant water company), and its successors and assigns, certain rights and privileges; that prior to October 18, 1894, all the property, franchises and contracts of the several water companies aforesaid had been acquired by The American Waterworks Company, a New Jersey corporation, and The Citizens Water Company, respectively, and that these two companies were the only companies on said last-named date engaged in supplying water to the various municipalities above named and their inhabitants; that between October 18, 1894, and October 20, 1894, The Denver Union Water Company acquired, by purchase from The Citizens Water Company, and from the legal successor in interest of The American Waterworks Com-

pany of New Jersey, all of the property and plant used for the distribution of water in the territory comprised in the City and County of Denver, including all franchises and contracts belonging to the said two companies and their predecessor companies (Record, pp. 4, 5).

The bill then alleges the execution by the defendant water company on October 20, 1894, of its mortgage or deed of trust to the Continental Trust Company of the City of New York to secure an issue of bonds to the amount of $8,000,000, the issuance and sale of all the bonds and the application of their proceeds to the acquisition, construction and extension of the waterworks plant, and the subsequent merging of the Continental Trust Company with the New York Security and Trust Company, whereby the latter became the former's successor as trustee, and its change of name to New York Trust Company, the name of complainant (Record, pp. 5, 6). The mortgage appears as an exhibit to the bill, and it is alleged that it covers all of the property of every description of the mortgagor, including franchises, easements, choses in action, waterworks, water rents, ordinances, contracts, etc., and also the right to receive the purchase price in case of sale to the city (Record, p. 7).

It is alleged further that since October 20, 1894, the date of the mortgage, the water company has been, and now is, the owner and in possession of the property mortgaged; that the water system of defendant water company is the sole means and source of supply of water to defendant city and its inhabitants, and that the maintenance, improvement and enjoy-

ment thereof are all essential and indispensable to the health, security and welfare of the city and its inhabitants (Record, p. 7).

The bill contains allegations as to the growth in population of the city; the necessity of expenditure of large sums by the water company since the execution of the mortgage for the enlargement and extension of its works to keep pace with such growth; the location of the city in an arid or semi-arid region where the water supply is limited, and water a commodity increasing in value; the necessity of anticipating, at least twenty years in advance, the needs of the city for water, and also of maintaining large storage reservoirs at the headwaters of the streams flowing eastward from the mountains from which the city's water supply is derived (Record, pp. 7, 8).

With respect to the defendant, The South Platte Canal and Reservoir Company, it is alleged that defendant water company caused its incorporation; that all of its capital stock since its incorporation has been and now is owned by the water company; that the South Platte Company, acting under the control of the water company, constructed the Cheesman dam and lake or reservoir, with a capacity of over 25,000,000,000 gallons, to be used as a storage reservoir to impound water for the supply of the city and its inhabitants through the waterworks system of the water company, and acquired other property, including water rights, filtration plants, etc., which form an essential part of the waterworks system in question (Record, pp. 8, 9).

It is averred in the bill that the South Platte Company, to secure an issue of bonds of $4,000,000.

running twenty years from their date, July 1, 1903, executed a mortgage or deed of trust of all its property, rights and privileges, and that the water company guaranteed the payment of the bonds, and that the same were all issued and sold and are now outstanding in the hands of purchasers, for value, and are by their express terms redeemable at any time between April 10, 1910, and April 9, 1911 (Record, p. 9).

The bill does not disclose the name or citizenship of the trustee under the mortgage of the South Platte Company, nor is it made a party to the suit.

It is alleged further that the South Platte Company on May 1, 1903, leased to the defendant company for the term of twenty years from July 1, 1903, all of its property, including the Cheesman dam and lake or reservoir, and that the water company is in full possession, control and use of this property, and that it constitutes an essential and integral part of its waterworks system (Record, p. 9).

It is averred in the bill that the defendant, the City and County of Denver, is the successor to the City of Denver and other municipalities which formerly existed within the present territorial limits of the defendant city, and that by virtue of Article XX of the constitution of Colorado, and the various statutory and legal proceedings under which it was organized, it succeeded to all the rights and liabilities, and assumed all of the obligations, of the former City of Denver and the other included municipalities, and is bound to carry out the contracts and ordinances of its predecessors, including Ordinance 44 of the series of 1890 of the City of Denver; and it is alleged that

in and by that ordinance there was granted to The Denver Water Company the right of laying down and maintaining water pipes, hydrants and apparatus for conveying and distributing water in and through the streets, alleys and public places of the City of Denver and additions thereto, and that said ordinance fixed no date for the termination of the rights and privileges thereby granted, except as provided by sections 11, 12 and 20 thereof. These sections are then quoted in the bill *in extenso*. (Record, pp. 9-11.)

Section 11 of the ordinance provides that:

> "At the expiration of the period of twenty years from and after the date of the passage and approval of the ordinance, in case the city shall then elect so to do, the said works may be purchased by the said city, and in case the parties can not agree, after such election, upon the price to be paid by the city for the water works of the said company, its successors and assigns, then their fair cash value shall be determined by arbitration, by five disinterested persons, none of whom shall be residents of Denver, two of them to be chosen by the city, two by the company, and the fifth by the four first chosen, and in case of failure on the part of the company to name arbitrators for the period of thirty days after the city shall have named arbitrators and notified the company so to do, the city may apply to any court having equity jurisdiction in the county in which the city of Denver shall then be situated for the appointment of two persons of

the qualifications aforesaid as such arbitrators, and the court may thereupon appoint two such persons, who shall act with the same force and effect as if appointed by the company, and the decision of a majority of said board shall be final and binding upon both parties, and upon the payment, or tender of payment, by said city the said company shall convey to said city all of its property, real or personal, easements, rights and privileges, and thereafter all franchises, rights and privileges which have been at any time theretofore granted said company, its successors or assigns, and which it may then possess, shall cease and be at an end."

Section 12 provides that:

"At the expiration of the said period of twenty years the said city may, at its election, renew the contract hereby made by ordinance to that effect, for a like period of twenty years, but at a price for hydrant rental 10 per cent. less than mentioned in section 10 hereof, for the period remaining after the ten years after May 1st, 1891, and for successive periods of twenty years at the price last aforesaid, as often and as long as the city may choose. This section is conditioned, however, upon the full performance by the city of the provisions of section 2 hereof." (Record, p. 36.)

The bill alleges further that The Denver Water Company and its successor and assignee, the defendant water company, have complied with the terms of

Ordinance 44, and also that the former plant of The Denver Water Company and additions thereto, and the new property, rights and facilities acquired and constructed, including those provided through the defendant, The South Platte Company, are interconnected and are integral portions of one and the same waterworks system, and together constitute the waterworks and property referred to in, and contemplated to be purchased by the city under the terms of, section 11 of Ordinance 44 (Record, p. 12).

The bill then alleges the enactment and approval, on October 2, 1907, of Ordinance No. 163 of the series of 1907, of the City and County of Denver (Record, pp. 12, 13).

This ordinance, and the contract entered into in pursuance thereof between the city and the water company, recite the shortness of the time prior to April 10, 1910, the date of the expiration of Ordinance 44, the unwillingness of the company to expend large sums for extensions for use in the future in view of the existing uncertainty, and the advantage of action by the parties prior to that date, and of having an immediate appraisement of the waterworks. It provided for the appointment or selection of five appraisers or arbitrators, to be made in the manner provided by section 11 of Ordinance 44, to determine the fair cash value of all the property, business and rights of The Denver Union Water Company, its allied and auxiliary corporations or associations, including not only the property acquired from its predecessor, The Denver Water Company (grantee in Ordinance 44), but all the property owned or used by the defendant water company, and its allied and auxiliary corporations, in any way connected with or related to

the water plant used by defendant water company in supplying the city and its inhabitants with water (Record, pp. 69-74).

It was also provided by Ordinance 163 that the appraisers should separately ascertain the fair cash value of all that portion of the pipes, pumps, hydrants, mains, etc., used by the defendant water company, but owned by the defendant city (Record, 74).

The appraisers were also required by Ordinance 163 to prepare a schedule of rates for water furnished to private consumers and water furnished to the city for its uses and for fire hydrant rentals, which should be "fair, just and reasonable rates for the water supplied and services performed and give to said Company fair, just and reasonable returns upon a fair and reasonable valuation of its property and to cover a period of twenty years" (Record, p. 75). This schedule was to be prepared with a view of submitting to the qualified electors of the city *at a special election*, not only the proposition of purchase by the city at the value to be determined by the appraisement under the ordinance, but also the question of making a new contract with the water company for a period of twenty years on the basis of the rates so to be fixed and ascertained by the appraisers (Record, p. 75).

By Ordinance 163, and the contract made in pursuance thereof, the propositions above referred to were to be submitted at a special election, and were as follows:

> 1. "Shall the City and County of Denver purchase the property so owned and used by The Denver Union Water Company,

and such allied and auxiliary corporations, persons or associations as may hold the legal title thereto, now engaged in furnishing the City and County of Denver and its inhabitants with water, at a price to be ascertained and fixed by said appraisers to be appointed in the manner provided for, and with the qualifications set forth in section 11 of said ordinance?"

2. "Shall the people of Denver make a contract for a period of twenty years with rates for water to be furnished to the City and County of Denver and to the private consumers of water therein plainly, specifically and unmistakably set forth and ascertained by appraisers as hereinafter set forth?" (Record, p. 72.)

The bill further alleges the appointment of arbitrators in the manner and mode specified in section 11 of Ordinance 44 and their possession of the requisite qualifications; that after a thorough and impartial investigation and hearing, and the taking of evidence and presentation of arguments, the board of appraisers, on March 20, 1909, announced its findings and determination to the effect that the value of the property as of the date of the appraisement was $14,400,000, subject to equitable adjustment between the parties in certain specified particulars (Record, p. 14).

The record shows, however (pp. 256-9), that the appraisers reported that it was an impossible task to fix fair and just rates for water for a period extending over twenty years, in compliance with the conditions

and requirements of Ordinance 163, and the contract made in pursuance thereof, and that, because of the board's failure to fix such rates, no special election was ever held, as contemplated by Ordinance 163, for the submission to the electors of the question of the purchase at $14,400,000 of the waterworks and property appraised, and the question of the making of a new contract between the city and water company for a period of twenty years upon the basis of rates to be fixed by the appraisers (Record, p. 259). The record fails to disclose any action under Ordinance 163, either by the city or the water company, subsequent to the report of the appraisers. The propositions to be submitted to the qualified electors, as required by that ordinance, were never submitted pursuant thereto, and the water company of course failed to submit to the city any proposition for a contract or franchise based on any schedule of rates fixed by such appraisers, because the appraisers utterly failed to fix any schedule.

Subdivision 8 of section 1 of Ordinance 163 expressly provides that in the event the electors of the City and County of Denver refuse to purchase the property, and also refuse to grant a new franchise, the rights of the parties under Ordinance 44 should not be affected. It is as follows:

> "It is further hereby agreed that if at said election as herein provided, and which it is understood and agreed and is provided hereby shall be a special election called for considering said two propositions, the electors qualified to vote thereon shall, by their majority vote, refuse to accept either the

proposition as to the purchase of said property or as to the granting of a new contract, the action of the said parties hereto in entering into this agreement and in submitting said matters to the vote of the electors qualified to vote thereon as herein provided, shall not constitute a waiver of the rights or privileges of either party hereto or prejudice in any manner or form or to any extent whatever the rights and privileges of the City and County of Denver, party of the first part, or The Denver Union Water Company, party of the second part, under and by virtue of the provisions, or any of them, of the said contract of April 10, 1890, being said Ordinance No. 44 of the Series of 1890, all the rights, privileges and franchises of either party hereunto provided for or contained in and by the terms of said contract and ordinance shall be and remain in full force and effect the same as if this contract and agreement had not been entered into and none of the proceedings herein provided for had been taken." (Record, p. 76).

The bill alleges, with respect to Ordinance 163 and the acts and transactions thereunder, that they constituted "a binding election by, and firm obligation upon, the defendant city to purchase said waterworks and property for and at said appraised value of $14,400,000, subject to the adjustments specified by said appraisers in accordance with the existing contract set forth and contained in said Ordinance No. 44" (Record, p. 15); but that the city, in dis-

regard of its obligations, has refused to complete the purchase at the appraised value, and is pursuing an unconscionable and inequitable course of conduct, intended and calculated to depreciate the value of the property, and to deprive complainant and the bondholders represented by it and defendant water company of their property without due process of law, and to impair the obligations of existing contracts (Record, p. 15).

The bill alleges further the adoption, at the general city election held on May 17, 1910, by a majority of the qualified electors voting thereat, of an amendment to the charter known as section 264a, by which a public utilities commission was created, consisting of three members; that the three named therein as the first members were the defendants, Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows, and that they qualified and are now acting and claiming to act as such public utilities commission under section 264a. This section vests in the commission complete charge and control of the matter of "the acquisition or operation of a waterworks for supplying the City and County of Denver and its inhabitants with water for all uses and purposes" (Record, p. 79). It provides, among other things, that if the defendant water company should place in escrow with The Continental Trust Company of Denver, on or before July 1, 1910, a deed from the water company to the city of all the property embraced in the appraisement made under Ordinance 163, free of all liens and encumbrances, with direction to deliver the same to said commission in exchange for seven million dollars par value of the bonds of the city, then the

commission should file its acceptance with The Continental Trust Company, and the same should constitute a binding contract to purchase (Record, p. 80); but that in case the water company failed so to do, then at a special election to be held September 6, 1910, there should be submitted to the qualified taxpaying electors "the question of issuing eight million dollars in bonds, to be sold or used to construct and put in operation a complete system of waterworks for supplying said City and County, and the inhabitants thereof, with water for all uses and purposes" (Record, p. 81).

The bill further avers that the water company did not execute or deposit in escrow a deed or conveyance of its water plant pursuant to the terms of section 264a, and that the trust company would not have joined in such a deed (Record, p. 34); that Ordinance 98 of the series of 1910, approved July 6, 1910, was enacted by the city council calling a special election for September 6, 1910, as provided by section 264a, for the submission to the taxpaying electors of the question of issuing eight million dollars in bonds to construct a new municipal water plant (Record, p. 19).

It is further alleged that even though there had been no election by the city to purchase the system of the water company prior to the adoption of section 264a, yet that section, when construed with the prior existing contracts, constituted an election to purchase, under Ordinance 44, either at the appraised price of $14,400,000, or, if not for that amount, at a price to be determined by a board of appraisers or arbitrators, as provided in section 11 of Ordinance 44;

but that, notwithstanding such election, the city has refused to name arbitrators under section 11 of Ordinance 44, or to proceed to an appraisement (Record, p. 21).

It is further averred in the bill that

> "the defendant, City and County of Denver, is not authorized by any provision of the constitution, statutes or charter relative thereto, but on the contrary is without authority to obtain, by purchase, a complete waterworks system already constructed and in existence, and already furnishing and prepared to furnish an adequate supply of water to the defendant city and its inhabitants for all purposes, both now and in the future, and at the same time to construct and put into operation another and duplicate complete system of waterworks for supplying the defendant city and its inhabitants with water for all uses and purposes,"

as provided by section 264a of the charter, and that bonds issued for that purpose would be beyond its powers (Record, pp. 20, 21).

It is further alleged that section 264a constitutes an impairment of the prior existing contract between the city on the one part, and the water company, and complainant as trustee, and the bondholders represented by it, on the other part, and constitutes an attempted deprivation of their property without due process of law, in that

> "in and by said section 11 of Ordinance No. 44 of the series of 1890 the defendant city

is and was prior to the pretended adoption of said charter amendment obligated to purchase the said water works system and plant for and at the price to be arrived at by an appraisement as provided in said section 11, and not otherwise, nor at any other price or valuation whatsoever, and by the steps heretofore taken as hereinabove recited, the defendant city had elected to, and prior to the pretended adoption of said section 264a, was bound and obligated to purchase said water works system and plant for and at the appraised valuation of $14,400,000.00, subject to the foregoing adjustments; in spite of which and in direct conflict with the provisions of said contract to purchase and in impairment of its terms, the defendant city has adopted said amendment to its charter, whereby all the authority of the defendant city relative to the acquisition or operation of water works and supplying the defendant city and its inhabitants with water for all purposes, purports to be committed to said Public Utilities Commission which is to have complete charge and control thereof, and which despite the provisions of said prior existing contract and the proceedings thereunder, is authorized and directed to pay for said water works and plant theretofore and at the instance of the defendant city and under the provisions of said contract, appraised at the valuation of $14,400,000.00, subject to such adjustments, no more than

the sum of seven million dollars." (Record, p. 22.)

With respect to the attitude of the defendant, The Denver Union Water Company, the bill alleges that that company, while it will fulfill all its contract obligations to the city, has determined that it is to its interest not to bring or join in any suit against defendant city founded on any contract or election to purchase either at the appraised value or otherwise, but to assert and litigate its right to a new contract for another period of twenty years under Ordinance 44, and it therefore refuses to institute, or to direct the South Platte Company, which it controls, to institute, a suit to compel a purchase by the city (Record, p. 25).

The bill avers further that if the alleged contract of purchase is not specifically enforced, and bonds are allowed to be issued and sold for the construction of a complete system of municipal waterworks, the city will be irrevocably committed to the construction of an independent and duplicate system, in competition with the existing system, and destructive of its income-producing and salable value (Record, p. 26).

The relief sought by the bill was an injunction restraining the defendants from holding the proposed election on September 6, 1910, and from issuing bonds to construct and put in operation a new system of waterworks, and from taking any steps whatsoever looking to the construction of a municipal plant; also the entry of a decree declaring the provisions of section 264a for the construction and operation of a municipal water plant to be void as in violation of

the constitutions of the United States and of Colorado; declaring the true force and effect of the existing contract relations between defendant city and the water company, the complainant trustee, and the bondholders represented by it; and requiring specific performance by the city and the water company and South Platte Company of the alleged contract to purchase the property of those two companies at the appraised value; or if the court should find that the city had elected to purchase the water plant, but the purchase price had not been determined, then that the court proceed through a master or appraisers to appraise, ascertain and determine the value of the plant and the purchase price to be paid therefor (Record, pp. 28-30).

On August 25, 1910, three days after the filing of the bill, the water company filed its answer, and at the same time filed its cross-bill.

The answer admitted most of the averments of the bill; it alleged that, as the city had failed to complete the purchase of the property of the water company, as provided in section 11 of Ordinance 44, it was obligated to grant to the water company a renewal of that ordinance for an additional period of twenty years from April 10, 1910 (Record, pp. 95, 96). It also alleged the total invalidity, upon numerous grounds, of section 264a, and all steps taken thereunder (Record, pp. 104, 105).

THE ALLEGATIONS OF THE CROSS-BILL.

The allegations of the cross-bill filed by the water company were for the most part in harmony with those of the bill. It contained averments, however, to the effect that the city had refused to take any steps to complete the purchase of the water plant at the appraised value under Ordinance 163, or any other sum; that in consequence of such refusal the cross-complainant was entitled to a renewal of Ordinance 44 for a further term of twenty years (Record, p. 123); that the value of cross-complainant's property was largely in excess of the appraised value (Record, p. 123); that the water company would perform all of the obligations resting upon it, as the same should in this cause be decreed to exist (Record, p. 123); that the city was pursuing an unconscionable plan and course of conduct, intended to destroy the value of cross-complainant's property; that, in pursuance of such plan, the city and its inhabitants, and certain political agitators and newspapers, falsely contended that Ordinance 44 terminated on April 10, 1910, and that since that time the water company had been doing business solely at the will and sufferance of the municipality, and that there was no existing contract to purchase at the appraised value, or at all, or to renew Ordinance 44 (Record, p. 124); that, pursuant to such plan, at the general city election on May 17, 1910, charter amendment section 264a was adopted, which cross-complainant alleges was not properly or at all adopted, for the reason, among others, that the said section as printed was submitted to the vote of the qualified electors as an entirety with no opportunity to express their will thereon, except by a vote in favor

of its adoption or its rejection as a whole; that the matters submitted in section 264a included numerous different, independent and unrelated matters not germane one to the other, or *in pari materia* (Record, pp. 125-129). Thereupon said section 264a is subdivided into sixty-five parts, each of which is alleged to be neither related to, nor connected with, any part of the remainder, and it is alleged that the vote taken thereupon does not indicate a fair, or any, expression of the will of the voters in regard thereto; that the total vote registered was 74,647; that the total number cast at the election by voters legally qualified to vote on said amendment was 61,667; that the total number voting for and against the amendment was 23,741; that the number cast in favor thereof was 12,342; and that the manner of the submission of said amendment violated the constitution and laws of Colorado, and the charter of the City and County of Denver, particularly section 179 thereof, and constituted a fraud upon the electorate; that said amendment has never been legally or at all adopted, and is not now in effect, and has no force or validity (Record, p. 130).

The cross-bill alleges further that Anderson, Van Cise and Fellows are not qualified members of, and do not constitute, the Public Utilities Commission of Denver, although assuming to act as such, because the office had not at any time prior to, nor at the date of, the election been created; and that they were not duly nominated under the existing charter and statutes of Colorado, the provisions and conditions of which are set forth at length, and all of which, it is alleged, were disregarded (Record, pp. 130, 131).

The cross-bill also avers that section 264a violates Article XX of the constitution of Colorado, in that it

was submitted to the electors in disregard of the provisions of sections 4 and 5 of such article. These sections relate to the submission of the question of granting a franchise relating to any street, alley or public place of the city, to the electors, and prescribe the conditions upon compliance with which a measure or charter amendment, upon petition therefor, shall be submitted to the electors at a general or special election (Record, p. 131).

It is also alleged in the cross-bill that section 264a was not adopted in compliance with Article XX of the constitution of Colorado, in that it constituted a wholly new and independent charter or charter provision, and no charter convention for the consideration thereof, in compliance with said Article XX, was held or attempted to be held (Record, p. 132).

It is also alleged that section 264a conflicts with section 10, Article I, of the constitution of the United States, and section 11, Article II, of the constitution of Colorado (the contract impairment clauses),

> "in that, whereas, by said contracts then and now existing the City and County of Denver was obligated to this defendant to purchase the water works system or plant of this defendant, and to pay therefor the value to be arrived at by appraisement as in said Ordinances No. 44 of the Series of 1890 and No. 163 of the Series of 1907 duly set forth; or, in lieu thereof, was obligated to renew the franchises and privileges evidenced by said Ordinance No. 44 of the Series of 1890 for an additional period of twenty years from and after the 10th day of April, A. D. 1910;

and in and by said existing contracts was and is obligated to take water for all uses and purposes solely and exclusively from this respondent through its water works system or plant and not otherwise, and to pay therefor the rates specified for said second period of twenty years in said Ordinance No. 44 of the Series of 1890; nevertheless, in and by said section 264a, which, if it was properly adopted, is a law, said City and County of Denver is forbidden to grant any new franchise to any private individual or corporation covering the supply of water to said City and County or its inhabitants, for any purpose, and is forbidden to obtain such supply except from a plant owned or leased and operated by said City and County of Denver; and is forbidden to purchase the water works system or plant of this defendant except at the price of $7,000,000.00 in bonds of the City and County of Denver, as in said section 264a specified, or for such price as may be approved by said Public Utilities Commission and ratified by the qualified electors; and is authorized to proceed immediately to the acquisition and operation of its own water works system or plant, and to supply therefrom said City and County of Denver and the inhabitants thereof with water for all uses and purposes; and said City and County of Denver is required, in case bonds to the amount of $8,000,000.00 are authorized therefor, to proceed at once to construct and put into opera-

tion a complete system of water works for supplying said City and County and the inhabitants thereof with water for all uses and purposes; and is denied the right to purchase or acquire or exercise any option, right, privilege or power of purchasing or acquiring any water plant or system from any person, persons or corporation except upon a vote of the qualified electors first had and obtained, authorizing the same; and is likewise denied the right or power to purchase and acquire any water system or plant, or to extend any contract with reference thereto, except upon such vote, notwithstanding the binding obligations of said existing contracts between said City and County and this defendant, requiring said City and County either to purchase said water works system or plant of this defendant or to renew said contracts and said franchises or privileges for the additional period of twenty years, without regard to any such vote." (Record, pp. 132, 133.)

It is also averred in the cross-bill that section 264a conflicts with the fourteenth amendment to the constitution of the United States, and corresponding articles of the constitution of Colorado, including section 25, Article V, thereof, because, under Article XX of the state constitution and the charter of the City and County of Denver, all persons desiring to engage in the business of supplying the city and county and its inhabitants with transportation, light, heat, power, telephone and telegraph service, and

other public utilities, are privileged to obtain franchises therefor, but these rights are by section 264a denied to such corporations as the water company, engaged in the business of furnishing the city with water; also because, in and by Article IX of the charter, concerning the acquisition by purchase, condemnation or construction by the city, of any public utility, work or way, other than waterworks system, the same cannot be acquired except upon the filing of a petition of a certain per cent. of the electors, describing such work or way, and requesting its acquisition, and except after investigation and report by the board of public works, etc., whereas, by section 264a, the water company and all persons and corporations engaged or proposing to engage in supplying water to the city and its inhabitants are denied the protection thus afforded to all other persons and corporations whatsoever, and their property is subject to be taken or destroyed, or the value thereof impaired, by the passing whim or caprice of the public or the uncontrolled will of the Public Utilities Commission; that section 264a constitutes a denial to the water company of the equal protection of the laws as between it and other persons or corporations engaged or desiring to engage in supplying water to the city and its inhabitants, because said section containing the proposal to acquire, by purchase, the system of cross-complainant for $7,000,000, submitted to and carried by a majority vote of the people, did not comply with any of the requirements of Article IX of the charter of the city, but authorized the commission, of its own motion, and without previous compliance with Article IX, to immediately submit to the qualified electors the question of the issuance of bonds to effect the pur-

chase of cross-complainant's property; yet in respect to the property of all other persons or corporations engaged in the business of supplying water to the city or its inhabitants, it was, prior to the adoption of section 264a, and is now, required that all of the privileges and safeguards in said Article IX be first observed and fulfilled (Record, pp. 133-135).

It is averred further that section 264a is in conflict with the fourteenth amendment, and also with sections 25 and 15 of Article II of the state constitution, in that the contract rights of the water company, under which the city must purchase cross-complainant's plant, or, failing in that, renew the franchise granted by Ordinance No. 44, were and are valuable property rights, of which section 264a purports to deprive cross-complainant without due, or any, process of law (Record, p. 135).

The cross-bill alleges further that Article XX of the state constitution, under which the charter of the City and County of Denver was adopted, and all acts and steps taken thereunder, including the supposed adoption of section 264a, are unconstitutional and invalid, because Article XX, as well as section 264a, is in violation of section 4, Article IV, of the constitution of the United States guaranteeing and requiring, in the state of Colorado, a republican form of government, as well as section 4 of the act of Congress of March 3, 1875, enabling the people of Colorado to form a constitution and state government (Record, p. 136); and also in violation of section 2, Article II, and section 1, Article V, of the constitution of Colorado, for the reason that said Article XX, and said section 264a, destroy a republican form of

government in a portion of the state of Colorado and the exercise of powers vested exclusively in the General Assembly of the state; that Article XX is in violation of section 2 of Article XIX of the constitution of the state, in that Article XX was not submitted to the people of the state, in accordance with requirements of its constitution; that said Article XX contains more than one amendment to said constitution as it then existed, and that each separate amendment was not voted upon separately; that said Article XX was not in the nature of an amendment to the then existing constitution, but an addition thereto, and that, either as an addition or as an amendment, it attempted to amend, and did alter and amend, more than six previously existing articles of said constitution; and that, while Article XX has been held valid by the Supreme Court of the state, its decision may be reversed in a certain original proceeding now pending in that court, brought to attack and overthrow the former final decision of the court (Record, pp. 136, 137).

It is further averred that none of the provisions of Article IX of the charter of the City and County of Denver, relating to the acquisition by purchase, condemnation, construction or otherwise, by the city and county, of any public utility, work or way, have been observed, either in respect to the acquirement of cross-complainant's waterworks system, or in respect to the acquisition of a new system of waterworks by construction, or the authorization or issuance of bonds therefor (Record, p. 137).

It is alleged further that the water company, in reliance upon its contract relations with defendant

city, has invested many millions of dollars in the acquisition, completion and enlargement of its plant (Record, pp. 137, 138); that, notwithstanding the contention of the city and its inhabitants that all the company's rights under Ordinance 44 terminated on April 10, 1910, it has continued to furnish water to the city and its inhabitants, not only by virtue of the contract for the renewal of Ordinance 44, but also by virtue of the right, power and authority to do so under its charter and franchise received from the state of Colorado, and the licenses, privileges and easements otherwise previously conferred upon it and its predecessors by defendant city and county and its predecessors (Record, p. 139); that section 264a was initiated, prepared and submitted as a part of a conspiracy, and to avoid the legal obligations of defendant city to the water company, and compel and induce it to part with its property, and to sell the same at $7,000,000, which is far less than its value (Record, p. 140); that, by reason of the acts of the city set forth, the company is unable to procure or borrow sums of money necessary for the enlargement and extension of its system, and the threats and actions of the city have resulted in serious impairment of the credit and of the value of the company's property and plant, and have cast a cloud upon its title to its property and contract rights (Record, p. 141).

The passage of Ordinance 98, of the series of 1910, is then averred, together with the pending election of September 6, 1910, and the threatened issuance of eight million dollars of bonds, if the same shall be authorized by such election (Record, p. 142).

The water company further alleges that its property within the City and County of Denver was as-

sessed for the year 1909 at $2,500,000; that the total assessed value of all the property in said city and county for said year was $132,909,000; that the company paid upon said assessment the sum of $90,826.40 in taxes, being a little less than 2 per cent. of the total taxes of the City and County of Denver; that for the year 1910 its assessment has been the same, and its taxes will probably be about the same; and that, should the eight-million-dollar bond issue be authorized, the company will be compelled to contribute a little less than 2 per cent. of said $8,000,000, being approximately $150,000, without any reference to the interest charges, and other charges for operation and maintenance; that it has no speedy, adequate or plain remedy at law; that it offers to perform its obligations to the city and county under and by virtue of Ordinance No. 44, including the renewal thereof for the term of twenty years from April 10, 1910, and all other existing contracts, and that the proposed issue of bonds will be wholly illegal, inequitable and destructive of the contract and property rights of the company, all of which will be consummated and carried into effect unless prevented by the injunctive order of the court (Record, pp. 142, 143).

The relief sought by the cross-bill was an injunction against all the defendants thereto, except the New York Trust Company, restraining them from holding the proposed election, or submitting the question of the issuance of said eight million dollars of bonds and from interfering with, or obstructing, the cross-complainant in its enjoyment of its contract or franchise rights under Ordinance 44; and it is prayed that a decree be entered that the water company is entitled to a renewal of its contract and franchise for twenty

years from April 10, 1910, under the terms and conditions of Ordinance 44, and that section 264a of the charter is unconstitutional, null and void (Record, pp. 144, 145).

After a hearing upon the applications of the complainant and cross-complainant for temporary injunctions, the Circuit Court, on September 6, 1910, entered orders on the bill and cross-bill, respectively, enjoining the defendant city and its officers, until the further order of the court, from issuing or delivering any bonds by authority of the election held September 6, 1910, or from constructing or putting in operation a new system of waterworks for the city (Record, pp. 270-272). The city was permitted to hold its election, at which, by a majority of the votes cast, the bond issue was authorized, as appears in the supplemental bill and supplemental cross-bill contained in the record (Record, pp. 284-289).

THE EVIDENCE.

Upon the hearing the city presented evidence by way of affidavits, tending to show that the water company had not kept or performed its covenants and agreements embraced in Ordinance 44, particularly as to the requirements of section 13 relating to the extension of mains and the setting of fire hydrants. From affidavits in the record it appears that some fifty-one ordinances of the city, enacted from 1902 to 1909, requiring about 158 hydrants and 85 extensions, have not been complied with (Record, pp. 261-265).

It appears from the record that The Denver Union Water Company, upon its own motion, initiated and submitted for adoption, under provisions of the charter of the city, to the qualified electors of the city at the general election in May, 1910, at which charter amendment section 264a was adopted, its own contract and franchise for a term of twenty years, which was defeated (Record, pp. 268, 269).

At the same election in May, 1910, there were also submitted two alternative propositions or proposed charter amendments relating to the subject in question; one entitled: "For section 264-½ concerning a public utility board and water plant," containing an offer by the city of nine million dollars in bonds for the entire system of the water company and South Platte company; and the other entitled: "For a business settlement of the water question, removing it from politics, compelling all taxable property, including corporation and vacant property, to pay its proportionate share for water plant, by creating a nonpartisan commission of five, and for adopting section 264-½ of the charter." Both of these propositions were defeated (affidavit of Edwin Van Cise, Record, pp. 246-255).

The record fails to show (and there are no allegations to that effect) that there has been any default on the part of The Denver Union Water Company in the performance of any of the terms or conditions of its deed of trust under which complainant is trustee, or any violation or breach of any of its covenants or engagements therein contained, or that the trust company, at the time it filed its bill, was in possession of the waterworks system of

the defendant water company and South Platte company, or entitled to any of the rents, revenues or income arising therefrom, or that it had any interest in the contracts alleged to exist by virtue of Ordinance No. 44 and Ordinance 163, except such interest as accrued to it under and by virtue of its trust deed.

Neither the bill nor the cross-bill nor the evidence in the record discloses any exclusive right or franchise of any description in The Denver Union Water Company nor any agreement by the city not to erect a municipal plant, existing either on April 10, 1910, or at the commencement of this suit, or at any time whatsoever.

From the interlocutory order of injunction entered upon the bill an appeal was taken to the Circuit Court of Appeals by all of the defendants to the bill except the water company and the South Platte company, and from the like order entered upon the cross-bill an appeal was taken by all the defendants to the cross-bill except the New York Trust Company.

ASSIGNMENTS OF ERROR.

The following errors were assigned to the decision of the United States Circuit Court of Appeals in the petition for the writs of certiorari filed in this court and are now hereby assigned:

> "1. That in holding that Ordinance 44, of the Series of 1890, and particularly sections 11 and 12 thereof, require the City and County of Denver either to renew the franchise of and contract with The Denver

Union Water Company or to purchase the plant of said company, the court adopts a construction of a franchise ordinance most unfavorable to the public, for the following reasons:

a. There is no express agreement on the part of the municipality to do either one or the other, and it is not a necessary implication that such was the intention of the parties.

b. Even conceding, for argument, that there is an ambiguity in the terms of the ordinance, the proper construction to be adopted is the one most favorable to the public, which would be that the city had a right to *either* purchase or renew, or to do *neither*.

2. Section 21 of the said ordinance provides that each grant, contract and agreement contained in the ordinance is to be deemed an independent agreement, with the same force and effect as if each section of the ordinance was contained in a separate ordinance by itself, and the decision completely disregards this express provision.

3. If section 21 is to be disregarded, so that sections 11 and 12 may be construed together, then, section 5 of said ordinance, which provides for the rates which the Water Company *is* to be permitted to charge during the term of the contract, and which has been declared unenforceable and void by the Supreme Court of Colorado in Denver vs. Water Co., 41 Colo., 77, as is shown in the

opinion of the Circuit Court of Appeals is an interdependent part of the contract, and Ordinance 44 of 1890 becomes void by reason of the unenforceableness of one of the most important provisions thereof.

4. Because there can be no renewal of Ordinance 44 of 1890. Under any construction of the different sections of that ordinance, section 5 thereof having been declared unenforceable, the whole ordinance must fall, at least as to any extension of the agreement contained therein, because, if any extension of the contract is made, it will necessarily be without any control of rates by the city, and there can be no waiver of such rate-making power by the city except by its express agreement.

5. Because, even if, as the court held, charter amendment section 264a was adopted to enable the municipality to avoid its obligation to the Water Company, still there is no impairment of the obligation of the contract, but a mere refusal to perform; for if the municipality was obligated to the Water Company, that obligation still exists regardless of section 264a.

6. Because the present plant of The Denver Union Water Company is not the plant which was the subject of Ordinance 44 of 1890; the present plant being made up of the plants of the Denver Water Company, which was the subject of the ordinance; The Citizens Water Company, which was a

separate and competing company covering practically the same field as the Denver Water Company; and several other independent companies, which were at the time of the enactment of Ordinance 44 of 1890 supplying outlying municipalities which were not parts of the City of Denver; all of which have been absorbed into the present plant, not as extensions thereof, but by purchase or merger.

7. That, as there was no impairment of the obligation of the contract, there was no federal question stated in the bill, and as the Water Company (a Colorado corporation) should have been aligned with the Trust Company (as plaintiff), the federal court had no jurisdiction of the cause.

8. Because the court held that the Council of the City of Denver had power to bind the city to purchase the plant of The Denver Water Company twenty years after their action was taken, whereas no such power existed in the Council.

9. Because in holding that the Trust Company contended that the city was required by the terms of Ordinance 44 of 1890 either to purchase the plant of The Denver Union Water Company or to renew its franchise, the court committed prejudicial error to these petitioners in that the bill of the Trust Company alleges that the city had an option to purchase, and afterwards elected to do so, but refused to pay the price, there-

by utterly failing to state a federal question, so that the bill should have been dismissed, and the cross-bill (not praying any relief against the original complainant) with it.

10. That holding that Ordinance 54 of 1894, relative to the South Denver plant, showed the intent of the city at the time of passing Ordinance 44 of 1890 to be that it should either acquire all the water systems in the city or permit the Water Company to do so, is erroneous because under said ordinance of 1894 the city might have become the owner of the South Denver plant, while even under the court's construction of the ordinance of 1890 the Water Company might at the same time remain in possession of its own plant.

11. Because the intent of the voters in charter section 264a has no bearing on the rights of the city and the Water Company; if the city is obligated to purchase the Water Company's plant, or to renew its franchise, it is still required to do so, even though section 264a does commit the city to the erection of a separate municipal plant. If the city is obligated to buy the Water Company's plant, neither the Trust Company nor the Water Company can complain if it constructs another; and if the city is compelled to renew the Water Company's franchise and contract, that franchise and contract not being exclusive, and the city not having agreed not to enter into competition with the

Water Company, neither the Water Company nor the Trust Company can complain. By holding that it was not the intent of the voters to have the city to purchase or renew and to construct, the Court of Appeals has attempted to find a federal question; but the intent of the voters, except as expressed in their acts, does not regulate the rights of the parties.

12. Because, if section 11 of Ordinance 44 of 1890, standing alone, would not require the city to purchase, it follows that if section 12 stood alone, it would not require the city to renew. Hence it is error to say that when they are taken together they create a legal liability, especially in view of the canons of construction adopted by this court in construing grants of franchises.

13. That the interlocutory injunction was issued without authority and contrary to the statute, being issued by one judge only. Jurisdiction of the cause was taken because the obligation was impaired under the Fourteenth Amendment to the Federal Constitution, the city charter being held to be a law of the state, and hence the officers enjoined were necessarily officers of the state.

14. Because the court should have ordered the bill dismissed, as the property of The Denver Union Water Company, which The New York Trust Company in its bill prays the city may be required to pay for, is not the property which the city reserved

the right to purchase in section 11 of Ordinance 44 of 1890.

15. Because The New York Trust Company, not being a party to the alleged contract between the municipality and the Water Company, cannot maintain an action for specific performance.

16. Because the court held that sections 11 and 12 expressed a contract or agreement on the part of the city to renew or to purchase, whereas those sections merely express reservations of rights by, or options in favor of, the city."

ARGUMENT.

I.

JURISDICTION OF THE CIRCUIT COURT.

The bill alleges jurisdiction of the cause in a federal court upon two grounds, namely, diversity of citizenship, and the existence of a federal question.

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1. DIVERSITY OF CITIZENSHIP.

The requisite diversity of citizenship, under the arrangement of the parties made by the pleader, appears on the face of the bill; the complainant is a citizen of New York, and the defendants are all citizens of Colorado. It is a familiar rule, however, that the court, in determining whether there is the requi-

site diversity of citizenship to give jurisdicton to a federal court, will arrange the parties with respect to their interest in the controversy, looking beyond the formal arrangement made by the bill.

Helm vs. Zarecor, 222 U. S., 32, 36.

Removal Cases, 100 U. S., 457.

Detroit vs. Dean, 106 U. S., 537.

Dawson vs. Columbia Trust Co., 197 U. S., 178.

Steele vs. Culver, 211 U. S., 26.

Parties whose interests in the matter in controversy are identical, and who seek substantially the same relief, should not be aligned on opposite sides. Here the bill, it is submitted, shows no conflict of interest between the complainant trust company and the defendant water company, justifying their arrangement as opposing parties.

The bill presents a suit of a dual character. It is brought for an injunction against proposed action by the city (the building of a new municipal plant), and also for the specific performance of an alleged contract.

If the suit were one solely to procure the injunction, there could be no question as to the identity of interest of the trust company and the water company in the controversy. Both unite in asking for practically the same injunction. The injunction sought by the bill and that sought by the cross-bill relate in the last analysis to the one matter of the building by the city of its own plant; the various other acts sought to be enjoined all have reference to this one matter of municipal construction. Both the bill and cross-bill

seek to restrain the city from building its own plant, or taking any steps looking to that end, and the injunctions entered upon them were in accordance with their prayers. The fact that the injunction sought by, and entered upon, the cross-bill of the water company goes farther and restrains the city and its officers from interfering with, or obstructing, that company "in the exercise and enjoyment of its contract and franchise right under said ordinance 44 of the series of 1890, and 163 of the series of 1907" (Record, p. 273), does not show any conflict or diversity of interest between the two companies. This relief is merely supplementary, and is in no respect antagonistic to that prayed by the bill and granted by the order of injunction entered upon it. The two companies are in complete harmony as to the controversy made by the bill, so far as it seeks an injunction.

Upon the other branch of the case—the specific enforcement of the alleged contract—it is also apparent that there is no actual conflict between the two companies. Both, in fact, seek the enforcement of the same contract, if by the term "contract" be meant the various ordinances and proceedings thereunder, conditioning and determining the rights of the parties. If these could be brought together in a single document or instrument, it would appear that both companies were seeking the enforcement, for the common benefit, of one and the same "instrument." Moreover, while the water company contends that it is entitled to a renewal, as against the claim of the trust company that the city has contracted to purchase, yet it is declared repeatedly in the bill and cross-bill that the water company will perform, and offers to per-

form, all existing contracts and obligations resting upon it (Record, pp. 25, 123).

There is but one basis for the claim of a conflict between these parties, and that is, that they differ as to the construction to be given to the combined ordinances and acts and proceedings which measure the city's obligation, if any, to the water company—the trust company maintaining that the city is obligated to purchase the plant of the water company, and the water company that the city must renew the franchise. It is evident that the city cannot be compelled to do both; its obligation, if any, is restricted to one of these two; and it is obvious that a bill with a double aspect, brought by these companies as parties complainant against the city, containing a prayer for relief in the alternative, would be the straightforward method of attaining the common object which, as disclosed by their pleadings, both have in view. That object, as already indicated, is the enforcement of the city's obligation to the water company.

> "It is a well settled rule that the complainant, if not certain as to the specific relief to which he is entitled, may frame his prayer in the alternative, so that if one kind of relief is denied, another may be granted; the relief of each kind being consistent with the case made by the bill."
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> Hardin vs. Boyd, 113 U. S., 756, 763; and cases there cited.

It is difficult to escape the conclusion that the "controversy" between these parties was pretended, and that their alignment upon opposite sides was a

mere contrivance between friends for the purpose of founding a jurisdiction which otherwise would not exist.

Dawson vs. Columbia Trust Co., 197 U. S., 178, 181.

The pretended difference between them is merely one of legal construction, and whichever of the claims asserted by them is accepted by the court will be perfectly satisfactory to both. In fact, the water company in its brief in the Circuit Court of Appeals said (p. 37):

> "The court can readily see that this difference in the positions of the trust company and the water company is not based upon any issue of facts but upon the legal effect to be given to certain undisputed facts. And while the water company believes that it is right in its contention and that such a contention is in the interest not only of the stockholders but the bondholders of the company, nevertheless, it offers to abide by its contractual obligations, whatever the court may determine them to be."

There are numerous circumstances pointing to the collusive character of the proceeding. It appears from the affidavit of Anderson (Record, p. 265) that the solicitors of the trust company had, shortly previous to the filing of the bill, and acting as solicitors for the water company, prepared the reply of that company to the Utilities Commission; and the bill and cross-bill afford inherent evidence of their simultaneous preparation. But three days elapsed between

the dates of their filing. The water company's answer alone, which was filed with the cross-bill, could not well have been prepared in that short interval of time.

By the terms of the mortgage it is expressly provided that the right of action thereunder is vested in the trustee, who shall be under no obligation to institute any such suit or to take any proceedings under the indenture until it shall be indemnified to its full satisfaction for all the expenses and costs of every kind, and that all of its reasonable and proper expenses and costs, including fees and charges of attorneys and agents employed by it in good faith, in the administration of the trust therein contained, shall be paid by the water company (Record, p. 58). The case, therefore, presents the spectacle of a complainant suing a defendant, by the latter's direction, and for its benefit and at its expense. The solicitors for the trust company bringing the suit, and those of the water company pretending to defend against it, are in fact and in law both the counsel of the water company, selected and paid by it, co-operative in its interest and subject wholly to its direction. This circumstance of itself, regardless of the merits of the controversy, should convince the court of the wholly artificial nature of the pretended difference between them and force an alignment of the parties to the bill as their interests actually are. The water company desires to prohibit the City and County of Denver from constructing a water system of its own and thereby compel it to receive its water supply as heretofore. It has invoked the agency of the trust company to effect this object from one standpoint, while it resorts to a flank movement for the same purpose as the representative of interests pretending to be

adverse to those of the trust company, and all through, the machinery of the federal court, which, but for such arrangement, would be wholly without jurisdiction. Collusion, however free from moral criticism, should receive no recognition from a court of equity.

In National Hollow Brake Beam Co. vs. Chicago Railway Equipment Co., 168 Fed. Rep., 666, the court at page 669 says:

> "Whenever suspicion arises, through motion or otherwise, that the prima facie averments of the bill to that end are merely colorable—that the alleged controversy 'is not really and substantially between the parties' of diverse citizenship, as arranged in the bill, but is in truth between one and another defendant of like citizenship—we believe it to be the duty of the court to make such reasonable examination as may be needful to settle the bona fides."

Nor is it material that the water company may have refused to join the trust company in bringing suit against the city, if there is no actual antagonism of interest between them.

In Stephens vs. Smartt, 172 Fed., 466, the court, referring to such a contention, said (p. 472):

> "And where in an equity cause in the Circuit Court a party, whose original alignment as a complainant would have defeated the federal jurisdiction, has been impleaded as a defendant because of his refusal to join in the suit or to take other necessary action,

but it appears that the real interest of such defendant is on the side of the complainant, and that he is not in actual antagonism to the complainant, or acting adversely to him in subservience to some illegal or fraudulent purpose (Doctor v. Harrington, 196 U. S. 579, 25 Sup. Ct. 355, 49 L. Ed. 606; Venner v. Great Northern Ry. Co., 209 U. S. 24, 28 Sup. Ct. 328, 52 L. Ed. 666), or in good faith opposed to the bringing of the suit on account of its supposed injurious effects on his own interests (Chicago v. Mills, 204 U. S. 321, 27 Sup. Ct. 286, 51 L. Ed. 504), such defendant, although refusing to join in the suit or take other action, is nevertheless, in the absence of such antagonism or opposition, to be realigned upon the same side of the controversy with the complainant, in accordance with his real interest, and the suit must thereupon be dismissed for want of the requisite diversity of citizenship."

Furthermore, if this suit be deemed one primarily to enforce specific performance of a contract, and incidentally to obtain an injunction to protect the contract rights meanwhile, then (in the absence of a federal question) the trust company, the conditional assignee of the water company under the latter's mortgage, cannot maintain this suit in a federal court, because its assignor, the water company, could not maintain it in that court against the city, likewise a citizen of Colorado.

The rule is well settled that a suit for the specific performance of a contract is one to recover the con-

tents of a chose in action, and cannot be maintained by an assignee in the federal court where the assignor could not have maintained it in that court.

Corbin vs. County of Black Hawk, 105 U. S., 659, 665.

Shoecraft vs. Bloxham, 124 U. S., 730, 735.

Here, however, the complainant has taken the position that the suit is primarily for an injunction, and that specific performance is but ancillary relief. In its brief in the Circuit Court of Appeals it says (p. 235):

> "Our preceding argument has established, we believe, that this is not primarily a suit for specific performance, but on the contrary is an action brought to protect the trust estate vested in the trustee, as security for the bondholders, and to preserve the same against an unlawful and unconstitutional impairment by the City and County of Denver. The prayer for specific performance is ancillary thereto, and for the purpose of having the entire controversy over which the Court has jurisdiction for one purpose, settled in this proceeding."

At pages 217-218 of complainant's brief in the Circuit Court of Appeals it is said:

> "In point of fact the manifest principal object of the bill is the protection of the contract rights of this appellee from impairment, and as an incident thereto, and in or-

der that the whole controversy may be settled, the enforcement of the contract is demanded."

In this view of the bill, it is evident there is no controversy between the trust company and the water company upon what is asserted to be the main branch of the case; namely, the application for the injunction. These parties are in entire accord in respect to that. It is only in regard to what complainant says is the incidental or ancillary purpose of the bill—the specific enforcement of the contract—that there is any difference, and that difference is merely a pretended one as to the legal construction of undisputed facts, to which we have already adverted.

Complainant in its brief in the Circuit Court of Appeals (pp. 57-9) contended that the bill presented a justiciable controversy between complainant and defendant water company justifying their alignment on opposite sides, by its various allegations setting forth the refusal of the water company to institute a suit to compel a purchase by the city and its refusal to join in any conveyance of the water plant to the city, etc. (Record, pp. 25 et seq.). Assuming, for argument's sake, that these averments state a justiciable controversy between these parties, they are, however, to be referred to the specific performance branch of the case; they have no place in the bill as an application for an injunction. And, as we have seen, a suit for the specific performance of a contract is one to recover the contents of a chose in action, and may not be maintained by an assignee, where the assignor could not have maintained it. If the trust company,

an assignee, cannot maintain the suit as one for specific performance, the fact that there are allegations in the bill, constituting a part of the statement of the cause of action for specific performance, and presenting a justiciable controversy, cannot operate to confer jurisdiction, and thereby set aside the prohibition of the statute (25 Stats. at Large, 434), against the maintenance of a suit to recover the contents of a chose in action by an assignee where the assignor could not sue.

In other words, so far as the bill is a suit for an injunction, it presents no controversy between the trust company and the water company justifying their alignment as opposing parties; if there is any controversy at all between them, it is presented by allegations of the bill as a suit for specific performance—a suit not maintainable in a federal court by this complainant upon the alleged contract.

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2. FEDERAL QUESTION.

The other ground of jurisdiction relied upon is the presence of a federal question. The rule seems to be settled that it is sufficient for jurisdictional purposes that a federal question which is more than colorable be alleged in good faith as a necessary part of plaintiff's statement of his cause of action, and it is immaterial, in determining jurisdiction, how the federal question should eventually be decided. If, however, the federal question attempted to be presented is wholly destitute of merit, or frivolous, or is merely colorable, or is one that has been foreclosed by the prior decisions of the court, so that it may fairly

be said that such a question no longer exists, its mere assertion in bill or petition does not afford a basis for the exercise of jurisdiction.

Gring vs. Ives, 222 U. S., 365, 370.

New Orleans Waterworks Co. vs. Louisiana, 185 U. S., 336, 344.

St. Joseph etc. R. Co. vs. Steele, 167 U. S., 659, 662.

Underground Railroad vs. City of New York, 193 U. S., 416, 422.

Defiance Water Co. vs. Defiance, 191 U. S., 184.

Shawnee Sewerage & Dr. Co. vs. Stearns, 220 U. S., 462, 471.

Newburyport Water Co. vs. Newburyport, 193 U. S., 561, 576.

The allegations of the bill, of course, determine the existence of a federal question. They may not be aided by those of the answer or cross-bill. Not only this, but the allegations relied upon as stating a federal question must be a necessary part of plaintiff's statement of his cause of action. Averments made by way of anticipation of a defense may not be considered by the court in determining whether a federal question is stated.

In Joy vs. St. Louis, 201 U. S., 332, it is said (p. 340):

> "It is a long-settled rule, evidenced by many decisions of this court, that the plaintiff cannot make out a case as arising under the Constitution or the laws of the United States unless it necessarily appears by the

complaint or petition or bill in stating plaintiff's cause of action. In Gold-Washing Co. v. Keyes, 96 U. S., 199, 203, it was said that before the Circuit Court can be required to retain a cause under its jurisdiction, under section 5, act of 1875, it must in some form appear upon the record, by a statement of facts, in legal and logical form, such as is required in good pleading, that the suit is one which really and substantially involves a dispute or controversy, as to a right which depends upon the construction or effect of the Constitution, or some law or treaty of the United States. * * * As has been stated, the rule is a reasonable and just one that the complainant in the first instance shall be confined to a statement of his cause of action, leaving to the defendant to set up in his answer what his defense is, and, if anything more than a denial of plaintiff's cause of action, imposing upon the defendant the burden of proving such defense."

In Devine vs. Los Angeles, 202 U. S., 313, this court said (pp. 332, 333):

"There being no diversity of citizenship, the jurisdiction of the Circuit Court could only be maintained upon the ground that the suit arose under the Constitution or laws or treaties of the United States, and a suit does not so arise unless it really and substantially involves a dispute or controversy as to the effect or construction of the Constitution or

> some law or treaty of the United States, upon the determination of which the result depends. And this must appear from the plaintiff's statement of his own claim, and cannot be aided by allegations as to the defenses which might be interposed."

In the above case it was held that allegations in a bill to quiet title, that defendant's adverse claims to certain property were based on an erroneous construction of a treaty, and certain stated acts and city ordinances, could not sustain the jurisdiction of the federal court.

In Boston Mining Co. vs. Montana Ore Co., 188 U. S., 632, the court said (pp. 638, 639):

> "It would be wholly unnecessary and improper in order to prove complainant's cause of action to go into any matters of defense which the defendants might possibly set up, and then attempt to reply to such defense, and thus, if possible, to show that a Federal question might or probably would arise in the course of the trial of the case. To allege such defense and then make an answer to it before the defendant has the opportunity to itself plead or prove its own defense is inconsistent with any known rule of pleading so far as we are aware, and is improper.
>
> The rule is a reasonable and just one that the complainant in the first instance shall be confined to a statement of its cause of action, leaving to the defendant to set up

in his answer what his defense is and, if anything more than a denial of complainant's cause of action, imposing upon the defendant the burden of proving such defense.

Conforming itself to that rule the complainant would not, in the assertion or proof of its cause of action, bring up a single Federal question. The presentation of its cause of action would not show that it was one arising under the Constitution or laws of the United States.

The only way in which it might be claimed that a Federal question was presented would be in the complainant's statement of what the defense of defendants would be and complainant's answer to such defense."

In New Orleans vs. Benjamin, 153 U. S., 411, it is said (p. 424):

"The judicial power extends to all cases in law and equity arising under the Constitution, but these are cases actually and not potentially arising, and jurisdiction cannot be assumed on mere hypothesis. In this class of cases it is necessary to the exercise of original jurisdiction by the Circuit Court that the cause of action should depend upon the construction and application of the Constitution, and it is readily seen that *cases in that predicament must be rare*. Ordinarily the question of the repugnancy of a state statute to the impairment clause of the Con-

stitution is to be passed upon by the state courts in the first instance, the presumption being in all cases that they will do what the Constitution and laws of the United States require; Chicago & Alton Railroad Co. v. Wiggins Ferry Co., 108 U. S., 18; and if there be ground for complaint of their decision, the remedy is by writ of error under section 709 of the Revised Statutes. Congress gave its construction to that part of the Constitution by the twenty-fifth section of the Judiciary Act of 1789, and has adhered to it in subsequent legislation." (italics ours.)

See also:

Arkansas vs. Kansas Co., 183 U. S., 185, 188.

Tennessee vs. Union etc. Bank, 152 U. S., 454, 460.

Third Street Ry. vs. Lewis, 173 U. S., 457, 460.

Florida Central Co. vs. Bell, 176 U. S., 321, 329.

Furthermore, it must be kept in mind that the complainant is not a resident or taxpayer of defendant city, and is unable therefore to make a case or present questions by its bill which a taxpayer might. Complainant claims merely under an alleged contract, and is limited in this suit to an assertion of its rights under that contract.

In view, therefore, of the foregoing limitations upon complainant here in the averment of a federal

question, we confidently assert that no federal question appears on the face of the bill, and that, if any such question is even suggested by the bill, it is without merit, and has been disposed of by the prior decisions of this court. In stating the federal question claimed to exist, we shall assume that the city is bound by a contract to purchase the plant of the water company, although there is no merit whatever in the claim of such a contract, and an examination of Ordinance 44, upon which it is alleged to be based, will disclose its lack of merit. The federal question claimed to exist is whether a contract obligation upon a city to purchase an existing system of waterworks is impaired by a subsequent act or charter amendment authorizing the construction of a new municipal system, where there is no express limitation, contract or statutory, upon the power of the city in reference to providing a water supply for itself and its inhabitants.

The question above stated, it will be noted, assumes that the city has entered into no contract expressly excluding it from constructing a system of its own, and that it is not limited by any provision of its charter or the statutes of the state in that regard. The record discloses no exclusive franchise, right or privilege conferred, or attempted to be conferred, upon the water company, or any of its predecessors in interest, except by the contract of December 16, 1870, between the City of Denver and The Denver City Water Company, which was annulled by a new contract made May 9, 1874, between the same parties, granting an exclusive right, but expressly limiting it to a period of seventeen years from the

date of the contract (Record, pp. 194, 207). Moreover, the District Court of Arapahoe County, by its decree of April 10, 1890, in the case of The Denver Water Company against The Citizens Water Company, adjudged that the City of Denver was powerless to grant the exclusive right it attempted to grant by the contract of May 9, 1874. That decision has never been reversed and, having been rendered against its predecessor, is binding on the water company (Record, pp. 274-282). Nowhere in the bill is any exclusive right claimed for the water company through its franchise, and nothing appears in the recitals of the ordinances to justify such a contention. In fact, the water company in its brief in the Circuit Court of Appeals concedes that the city may construct its own waterworks under proper authority and in a proper manner. It there says (p. 169):

> "We do not argue, as appellants' counsel profess to believe, that the obligation of the water company's contract would be impaired if the city, under proper authority and in a proper manner, engaged in the construction of its own water works."

Recurring to the federal question, then, which the bill attempts to raise—viz., whether one holding the contract of a city to buy a system of waterworks may, by reason of that fact alone, enjoin it from constructing a system of its own. Does the charter amendment, so far as it authorizes the city to build, impair the obligation of the contract to buy? The city is not alleged to be insolvent or unable to fulfill the alleged contract obligation. There is no constitu-

tional or other limitation on its power of contracting indebtedness to obtain a water supply for itself and its inhabitants. The constitution of Colorado, in effect in 1890 when Ordinance 44 was passed, and now in effect, limits the indebtedness by loan of any city, but provides that "debts contracted for supplying water to such city or town are excepted from the operation of this section."

Colorado Const., Art. XI, sec. 8.

1 Mills' Ann. St., p. 333. (See Appendix, p. 246.)

This court has repeatedly held that the fact that a city has granted a franchise to an individual or private corporation does not preclude it from constructing and operating its own system in competition with the existing system, provided the franchise is not exclusive. The question has been determined in a decisive manner by the decisions of this court. Reference will be made to the authorities in a subsequent part of this brief.

The question we shall now consider is, whether there is or can properly be any *other* federal question stated in complainant's bill.

It is apparent that the bill, considered as a suit for an injunction, can properly state but the one federal question; namely, whether the contract to purchase was impaired by the provision of the subsequent charter amendment, section 264a, authorizing the city to build. The only action or proposed action by the city, under section 264a, which the bill seeks to enjoin, is the construction of a new plant by the city, or the doing of any acts looking toward that end. The prayer of the bill is for a decree

> "declaring *those provisions* of the aforesaid section 264a of the charter of the City and County of Denver *contemplating and providing for the construction and operation of a municipal water plant*, and the authorization and issuance of bonds for that purpose to be wholly and entirely void and of no effect, for the reason that they and each of them are in conflict with, and in violation of the articles and sections of the constitutions of the United States and of the State of Colorado hereinbefore specified." (Record, pp. 28, 29.)

In fact, the only action or proposed action under section 264a which could be the subject of an injunction in this suit is that which might be taken under its provisions relating to the construction and operation of a municipal plant and the issuance of bonds therefor.

The bill does not proceed on the theory that section 264a is void *in toto;* the trust company in its brief in the Circuit Court of Appeals says (p. 212):

> "But it must be observed that so far as the appellee Trust Company is concerned, its bill does not claim that the charter amendment (section 264a) is in all respects and *in toto* void as unconstitutional, but only that it is invalid in the particulars hereinabove specified and wherein it impairs the obligation of the contract."

The water company in its brief in the Circuit Court of Appeals says (p. 37):

> "The trust company, as we understand it, does not deny the adoption of section 264a of the charter, but contends only that that portion of it which seeks to impair the obligation of its contract is void."

Furthermore, the complainant, not being a taxpayer of the city, but claiming merely under a contract, can present by its bill only those questions relating to its contract rights. Other questions, federal or otherwise, have no proper place in the statement of its cause of action.

We think there can be no doubt whatever that the bill, considered solely as a proceeding for an injunction, presents no federal question, because the provision of the charter amendment 264a authorizing the city to build its own water plant impairs no obligation of any contract contained in Ordinance 44 of 1890 or Ordinance 163 of 1907, for that the city did not grant by either of these ordinances any *exclusive* franchise, nor by the terms of either agree not to build its own plant.

The only legislation specified in the bill claimed to impair the obligation of the contract alleged to be contained in Ordinance 44 of 1890 is the charter amendment adopted May 17, 1910, by popular vote, known as section 264a, and the only part of that amendment challenged by the bill as accomplishing such result is the offer of seven millions of dollars for the water company's water plant, and, in the event of the failure of the water company to accept that offer, the authorization of an issuance of eight millions of bonds and the construction of an independent municipal water plant out of the proceeds of such bonds. The

allegations of the bill intended to suggest a federal question must be read in the light of Ordinance 44 of 1890, Ordinance 163 of 1907, and charter amendment section 264a, a copy of each of which is attached to the bill as an exhibit, and by apt allegation made a part of the bill itself. The moment that these exhibits are examined—and they must be examined because they are a part of the bill—the allegations of the bill, in the nature of conclusions, are thereby shown to be mere pretense and entirely colorable, and insufficient to raise a federal question.

From the allegations of the bill and these exhibits it clearly appears that the only acts of the city, legislative or otherwise, which can be contended to be an impairment of any obligation of any contract claimed to exist, are the repudiation by the city of its alleged obligation to purchase, and the authorization to construct an independent municipal water plant. The repudiation of a contract to purchase or to complete a purchase cannot alone constitute any impairment of an obligation to purchase, assuming such obligation to exist, because if the contract to purchase exists, the law furnishes ample means to recover the purchase price or to compel the completion of the purchase without any allegation whatever relative to the repudiation. The repudiation or refusal to purchase or complete the purchase can in no event be an element of the statement of the complainant's case.

The subsequent legislation, section 264a, authorizing the issuance of bonds and the construction of a municipal plant can by no stretch of the imagination be construed to be an impairment of the obligation of a contract to purchase or to complete a purchase. The only possible obligation of any contract which could

be impaired by any such legislation as is contained in section 264a would be an obligation arising out of an agreement not to construct an independent municipal water system, or out of a franchise or contract granting an absolutely exclusive privilege to the water company. It is nowhere alleged in the bill that the water company possesses or owns, by virtue of Ordinance 44 of 1890 or any other grant, any exclusive right or exclusive franchise whatever; nor is it alleged, or even suggested in the bill, or contended, that the city ever engaged or contracted not to build an independent municipal water plant of its own. Consequently the exhibits to the bill, which are a part thereof, control the allegations which are merely conclusions, and these exhibits disclose no contract or agreement whatever, the obligation of which is anyway impaired by the city's refusal to purchase, or its authorization of bonds and the construction of its own water system.

Continental Securities Co. vs. Interborough R. T. Co., 165 Fed., 945, 955.

Equitable Life Assur. Soc. vs. Brown, 213 U. S., 25, 43.

Considering now the bill as a suit for the specific enforcement of the alleged contract to purchase, it is evident, under the established rule that the "complainant in the first instance shall be confined to a statement of his cause of action, leaving to the defendant to set up in his answer what his defense is" (202 U. S., 334), that no federal question can properly be stated in the bill upon this branch of the case. A bill or petition in a suit, the sole object of which is to enforce an alleged contract, does not set forth any element or necessary part of the cause of

action, but merely anticipates a possible defense, when it alleges that certain legislation subsequent to the contract impairs its obligations. If section 264a materially diminishes or impairs any rights conferred by complainant's alleged contract, or renders less effective the remedy for its enforcement, it constitutes an impairment thereof. But it by no means follows that every impairment of contract constitutes the basis of a federal question for purposes of jurisdiction; if an averment of impairment is not a necessary part of the cause of action, but should be made by way of reply, its presence in the bill does not confer jurisdiction.

Assume, for instance, for the sake of argument, that one of the provisions of section 264a limits the amount to be paid by the city for the company's waterworks to $7,000,000, and is an impairment of a prior obligation of the city to pay $14,400,000 therefor. Complainant, or the water company, suing the city for the specific enforcement of the contract to purchase at the price of $14,400,000, cannot properly allege, as a part of the cause of action, that the city has by its charter amendment precluded itself from paying the full contract price and had thereby impaired the contract. If it did, it would be anticipating a possible defense, and that may not be done for the purpose of presenting a federal question.

The contention has been made, though there appears to be no express allegation in the bill to that effect, that the provision of section 264a quoted below constitutes an impairment of a contract:

> "Except as in this section provided, the city and county [of Denver] shall never pur-

> chase or acquire or exercise any option, right, privilege or power of purchasing or acquiring any water plant or system from any person, persons or corporation except upon a vote of the qualified electors first had and obtained authorizing the same, and wherever in any ordinance or contract the former City of Denver was given the right, or the city and county now has the privilege or power to purchase or acquire any water system or plant or to extend any contract with reference thereto, the term 'city' used in any such ordinance or contract shall be taken and held to mean the qualified electors of the city and county and not otherwise." (Record, pp. 79, 80.)

Under section 11 of Ordinance 44, the option to purchase, or, under section 12, the option to renew, might be exercised by the "city"—that is to say, as is contended by respondents, by the city council or governing body of the city, without the necessity of a vote of the electors—and it is contended that the provision of section 264a above quoted, requiring such a vote as a condition precedent to the effective exercise of an option to purchase a water plant or renew a franchise, is an impairment of a contract obligation.

It is difficult to see how by any possibility the provision of section 264a above quoted can be the subject, upon this bill, of any injunctive relief. Moreover, no allegation setting forth this provision as impairing a contract would be a necessary or proper part of the statement of a cause of action for the specific performance of such contract. But, in any

event, this provision relates solely to the making of future contracts respecting the purchase or acquiring of a water plant by the city. By its express terms it is to have only a prospective operation. No provision of section 264a can impair the obligation of any contract unless the contract was in existence prior to its adoption. If the contract was then in existence, the provision in question, having no retroactive effect, does not refer to it and leaves it absolutely unaffected.

In this connection the decision of the Circuit Court of Appeals in this case, reported in 187 Federal at page 890, will be briefly considered, so far as it relates to the question of jurisdiction. That court held that it was unnecessary to determine the question of jurisdiction on the ground of diversity of citizenship, as there was, in its opinion, a federal question in the case.

The court, in the first place, in construing sections 11 and 12 of Ordinance 44, held that the city, by its failure, at the expiration of Ordinance 44 on April 10, 1910, to grant a renewal under section 12, became obligated to purchase under section 11. Thus it said: "If the city having the power to renew (on April 10, 1910) did not exercise it, it should purchase" (Opinion, p. 897). "The contract was that when the 20-year period expired, if the city did not by ordinance grant the company a renewal * * * it would take over the entire business by buying the property" (p. 902).

The court held that section 264a was a law of the state, and in effect a direction of the state to the city not to carry out the contract to purchase, and

that thereby the obligation of that contract was impaired. The opinion says:

> "The charter amendment is in such case none the less void by reason of having its initiative in the electorate instead of in a representative legislative assembly. * * * The acts of the electors of a municipality in initiating and adopting local legislation are still laws of the state within the contract clause of the constitution. While the state could not annul or render fruitless a lawfully executed contract, nevertheless it might directly or indirectly determine the choice of the city between the contract alternatives, for the city as a subordinate governmental division is subject to its direction and control." (p. 899.)
>
> "If the charter amendment fairly construed means that the city shall neither elect to purchase the property of the water company at the value to be agreed on or else fixed by appraisers, nor renew the contract upon the terms specified in section 12 of the ordinance of 1890, it is void as impairing the obligation of a contract lawfully entered into, the duty to observe which still subsists." (p. 899.)
>
> "The offer contained in the section of the charter of $7,000,000 for the property of the water company and the provision for the construction of a municipal plant in case the company refused to accept that sum constitute a distinct assertion that there will be

> no election to purchase according to the terms of section 11 of the ordinance of 1890. That section required that the city elect to purchase before the matter of price or value should be entered upon. If after the election was made the parties could not agree, there was then to be an appraisal by five disinterested non-resident persons which should 'be final and binding upon both parties.' These provisions are important and substantial, and the charter section is adverse to them. In effect that section declares that if the Water Company declines to accept the sum arbitrarily fixed the city shall then proceed to construct a plant of its own; and that means there shall be no purchase according to the contract."

The theory upon which the Court of Appeals found an impairment, then, is that section 264a, a law of the state within the contract clause of the constitution, directed the city not to purchase or elect to purchase in accordance with section 11 of Ordinance 44, and thereby it impaired the obligation of the contract to purchase under that section. Assuming, for the sake of argument, the correctness of the theory adopted by the court and that the bill contains allegations presenting the question thus determined, it is nevertheless apparent that such allegations do not constitute a necessary part of complainant's cause of action. They are surely not a part of the cause of action for an injunction; they relate exclusively to the enforcement of the alleged contract. They but anticipate a possible defense by the city, and if such

defense is interposed, they may be made by way of reply. They are, therefore, not available to confer jurisdiction upon the ground that they state a federal question.

We think that it conclusively appears that the bill properly presents no federal question, unless section 264a, in authorizing the issuance of bonds for a new plant, impairs the obligation of the alleged contract to buy the existing plant. Is the city, because obligated to purchase the existing plant, thereby precluded from building a system of its own where it is not subject to any express statutory or contract limitations? The contention that it is so precluded we deem to be wholly without merit. Previous decisions of this court have disposed of the question, so that it may no longer be fairly said to be a "question." This court has held time and again that a municipality may grant a waterworks franchise to an individual or private corporation, and if the grant contains no words of exclusion, or confers no exclusive right, the municipality is not thereby prevented from building and operating its own competitive system at the same time.

In Knoxville Water Co. vs. Knoxville, 200 U. S., 22, it was held that a stipulation in an agreement between a city and a water company, that the former would not during the period of the agreement grant to any person or corporation the same privileges given to the water company, "was by no means an agreement that it would never during that period construct and maintain waterworks of its own" (p. 35). In that case the water company sought to enjoin the city from issuing bonds to construct a separate, independent and competing plant (p. 32), contending that such action by the city impaired the obligation of the agreement

with the city, which provided that the grant to the water company should be exclusive as against all other persons or corporations. It was held that the bill seeking an injunction upon such an agreement stated a federal question, although it was determined adversely to complainant. In the case at bar, complainant asserts no exclusive right of any character, nor any agreement on the part of the city not to build.

In Bienville Water Supply Co. vs. Mobile, 175 U. S., 109, a suit to enjoin a city from constructing its own works, the bill averred that the defendant city had entered into a contract to have a system of its own built, and that this was a violation of the contract between the water company and the city to furnish the latter with water. The court held that the contract, containing no exclusive stipulation, was not violated.

In Skaneateles Water Co. vs. Skaneateles, 184 U. S., 354, a suit by a water company to restrain a village from constructing a waterworks plant under an ordinance which plaintiff claimed was an impairment of its contract rights, it was held that such rights, not being of an exclusive character, did not prevent the village from constructing its own works.

In Hamilton Gas Light Co. vs. Hamilton City, 146 U. S., 258, the plaintiff's contention was that there was "no statute of Ohio authorizing any city in which there are already gas works in full and complete operation to erect gas works, or to levy a tax for that purpose" (p. 265), or if there was one which could be so construed, it impaired the obligation of plaintiff's contract. The court held that a statute of Ohio providing that the city council of any city or village should have power, whenever it was deemed expedient and for

the public good, to erect gas works at the expense of the corporation, or to purchase gas works already erected therein, should be construed to authorize the building of municipal gas works, notwithstanding the existence of other gas works in the municipality, and that, so construed, it did not impair the obligation of a contract of the gas company with the city conferring no exclusive privilege.

In Stein vs. Bienville Water Supply Co., 141 U. S., 67, the court said (p. 81):

> "We are forbidden to hold that a grant under legislative authority of an exclusive privilege for a term of years of supplying a municipal corporation and its people with water drawn by means of a system of water works from a particular stream or river, prevents the state from granting to other persons the privilege of supplying, during the same period, the same corporation and people with water drawn in like manner from a different stream or river."

In Joplin vs. Light Co., 191 U. S., 150, it was held that a city granting a franchise to construct and operate a light plant to supply lights for the use of the inhabitants of a city, did not thereby contract not to build works of its own during the continuance of the franchise, and that a municipal ordinance authorizing the building of such works did not impair the obligation of the contract existing under the ordinance granting the franchise. The court (at p. 157) quoted from Skaneateles Water Works Co. vs. Skaneateles 184 U. S., 354, 363, as follows:

> "There is no implied contract in an ordinary grant of a franchise, such as this, that the grantor will never do any act by which the value of the franchise granted may in the future be reduced. Such a contract would be altogether too far-reaching and important in its possible consequences in the way of limitation of the powers of a municipality, even in matters not immediately connected with water, to be left to implication. We think none such arise from the facts detailed."

In Bienville Water Supply Co. vs. Mobile, 186 U. S., 212, this court quoted with approval the following language of the Supreme Court of Alabama, in City of Mobile vs. Bienville Water Supply Co., 30 Southern, 445, 446:

> "It cannot be pretended that, in granting a charter to the complainant company in 1883, the legislature conferred on that company any exclusive privilege for supplying the city of Mobile and its inhabitants with water. All rights not exclusively granted to the complainant were reserved, and the rights thus reserved included the granting of a franchise to another corporation to carry on the same business in the same territory. While the effect of granting such a franchise, afterwards, to the city, might be to impair and possibly by fair competition to ultimately largely destroy the value of complainant's plant, it would not be in excess of

legislative power to grant the franchise to the city, nor would it in anywise infringe the Federal Constitution, prohibiting a state legislature from passing laws impairing its obligations."

In Helena Water Works Co. vs. Helena, 195 U. S., 383, it is said (pp. 387, 388):

"As the ordinance under consideration contains no express stipulation that the city shall not build a plant of its own to supply water for public and private purposes, and the grant is expressly declared not to be exclusive of the right to contract with another company, this case, unless it can be distinguished, is ruled by recent decisions of this court. Long Island Water Supply Company v. Brooklyn, 166 U. S. 685, 696; City of Joplin v. Southwest Missouri Light Co., 191 U. S. 150; Skaneateles Water Works Co. v. Skaneateles, 184 U. S. 354. These cases hold that the grant of the franchise does not of itself raise an implied contract that the grantor will not do any act to interfere with the rights granted to the water works company, and that, in the absence of the grant of an exclusive privilege, none will be implied against the public, but must arise, if at all, from some specific contract binding upon the municipality."

At page 392 it is said:

> "Had it been intended to exclude the city from exercising the privilege of establishing its own plant, such purpose could have been expressed by apt words, as was the case in Walla Walla City v. Walla Walla Water Company, 172 U. S. 1. It is doubtless true that the erection of such a plant by the city will render the property of the water company less valuable and, perhaps, unprofitable, but if it was intended to prevent such competition, a right to do so should not have been left to argument or implication, but made certain by the terms of the contract."

In Vicksburg vs. Waterworks Co., 202 U. S., 453, it is said (p. 469):

> "Unless the city has excluded itself *in plain and explicit terms* from competition with the waterworks company during the period of this contract it cannot be held to have done so by *mere implication*." (italics ours.)

In Long Island Water Supply Co. vs. Brooklyn, 166 U. S., 685, it is said (p. 696):

> "The contract in terms contained no words of exclusion. It gave to the company the privilege of laying its mains in the streets of the town, and contained a covenant on the part of the town to pay certain hydrant rentals. But grants from the public are strictly

construed in favor of the public, and grants of a privilege are not ordinarily to be taken as grants of an exclusive privilege."

In Water, Light & Gas Co. vs. Hutchinson, 207 U. S., 385, this court said (pp. 396, 397):

"There are privileges which may exist in their full entirety in more than one person, and the privilege or franchise or right to supply the inhabitants of a city with light or water is of this kind. A grant of power to confer such privilege is not necessarily a grant of power to make it exclusive. To hold otherwise would impugn the cited cases and their reasoning. It would destroy the rule of strict construction. The foundation of that rule requires the grant of such power to be explicit—explicit in the letter of the grant—or, if inferred from other powers or purposes, to be not only convenient to them, but indispensable to them. And these conditions are imperative—too firm of authority to be disregarded upon the petition of equities, however strong."

In Newburyport Water Co. vs. Newburyport, 193 U. S., 561, the court said (p. 577):

"Now, it is conceded that the charter of the water company was not exclusive, and was subject to repeal, alteration or amendment at the will of the legislature. This being the case, it is evident that no deprivation of property without due process of law or

> impairment of the obligations of a contract did or could arise from the act of the legislature empowering the city to erect its own waterworks."

See also:

> Lehigh Water Co. vs. Easton, 121 U. S., 388.
>
> Lehigh Water Co.'s Appeal, 102 Pa. St., 515, 528.
>
> In re Borough of Millvale, 162 Pa. St., 364.
>
> Brummitt vs. Ogden Water Works Co., 33 Utah, 289.

In the absence of an exclusive franchise, or of an agreement not to erect a municipal plant, the city should not be enjoined from constructing such a plant, even though it is obligated to purchase the water company's works or to renew its franchise. The city may construct one, while the other is being operated by a private corporation under a franchise from the city, as the case of Knoxville Water Co. vs. Knoxville, *supra*, shows; and the Supreme Court of Colorado has held the same in Donahue vs. Morgan, 24 Colo., 389.

The Supreme Court of Ohio, in Elyria Gas & Water Co. vs. Elyria, 57 Ohio State, 374, said:

> "That a municipal corporation may own two plants, one acquired by purchase, and another erected by it, or after having acquired one in the former mode may proceed to erect a new plant, is not questioned."

Even assuming, for the argument, that a municipal corporation does not possess such power, yet complainant's alleged contract of purchase, against a city able to perform it, cannot be affected by municipal construction. The building of a dozen plants will not affect or impair the city's obligation, if it exists, to buy an existing plant. Therefore there is no justice in permitting the complainant to enjoin the city from constructing its own plant.

In fact and in law there is and should be no limitation upon the powers of a municipality to obtain a water supply for itself and its people. Were it otherwise, it might find itself at some time wholly unable to supply all its inhabitants and territory with an absolute necessity of life. Especially is this true in an arid region like that in which Denver is situated. Moreover, the power of the City of Denver to construct and to purchase water systems is not conferred upon it by section 264a of the charter. That section is merely designed to carry into effect an authority previously conferred by the Constitution of the State, Article XX of which expressly gives it the power to construct, condemn, purchase, acquire, lease, add to, maintain, conduct and operate waterworks. It had the same power under its charter at the time Ordinance No. 44 was enacted. (See Session Laws Colo. 1889, pp. 128, 129; quoted *infra*, pp. 105-106.

There is abundant authority in the decisions of this court for the precise proposition that a city in granting a waterworks franchise to a private corporation or an individual, containing no words of exclusion, does not preclude itself, during the life of the franchise, from constructing its own works. If

complainant had alleged in its bill (as did the water company in the cross-bill) that the city was bound by a contract of renewal, instead of one of purchase, then this mass of authority would conclusively dispose of the question thus raised. But the federal question, so-called, upon the face of the bill is far less substantial, and, it is submitted, is entirely devoid of merit. We believe it has been demonstrated that the bill, restricted to its legitimate function of stating a cause of action, points to but one provision or set of provisions in section 264a, which can be said, with any show of reason, to impair the alleged contract of purchase; namely, those relating to the construction of a municipal plant. But how can the construction of a new plant in any manner affect or impair a contract to buy an existing one? How can it be said, as a matter of common sense, that one asserting a contract obligation on the part of another is injured because the latter is proceeding to incur a second obligation in no respect disabling him from performing the first obligation? The city is not alleged to be insolvent (if that be material), and its power of contracting indebtedness for a water supply is unlimited under the constitution of the state. While a taxpayer might assert the invalidity of the second obligation above mentioned, or of the statute or charter amendment authorizing it, one claiming under the prior contract or obligation, and that only, surely cannot.

Counsel for the water company concede that the city, if not bound by any exclusive contract, might build its own works if it proceeds legally and in a proper manner. In its brief in the Circuit Court of Appeals it said (pp. 259, 260):

> "If the contract between the water company and the city is not exclusive in its character; or if, when properly construed, it contains no stipulation whereby the city has contracted away its right to build a water works system, beyond question, it may do so, provided it proceeds legally and in a proper manner; and in such case the water company, though damaged, would have no right to relief either at law or in equity because it would be *damnum absque injuria.*"

We believe the only semblance of a federal question presented by the bill (and it is devoid of merit) is whether the city may build its own plant where it has not expressly excluded itself from so doing. In fact, this is the ultimate question presented by the record now before this court. That record presents appeals from orders of injunction in effect forbidding the erection of a municipal plant and practically nothing else. The city's position is that whatever may be its obligation as to the purchase of the water company's plant or the renewal of its franchise, it may proceed to build and operate its own plant. The fact that it is, or may be, under an obligation to do either, does not in law prevent it from doing what the injunctions appealed from prohibit; viz., constructing and operating a municipal plant.

II.

THE CONTRACT.

Let us ascertain what the contract is which is alleged to have been impaired. The trust company sets forth sections 11 and 12 of Ordinance 44 of the series of 1890 (Record, p. 36), and alleges that the city has already elected to purchase the plant of the water company, either by virtue of the enactment of Ordinance 163 of the series of 1907 (Record, p. 69), which it construes as an agreement by the city to purchase after appraisement, "unless it should grant to the defendant water company, its successors and assigns, a new franchise differing in its terms from said Ordinance No. 44," (par. 10 of bill), or by the adoption of section 264a of the charter.

It is also contended that unless Ordinance 163 of 1907 is construed to create an obligation to purchase on the part of the city, it impairs the obligation of the contract contained in section 11 of Ordinance 44 of 1890 (par. 15 of bill). And it is further contended that charter amendment 264a is void in part, because it impairs the obligation of the city's contract to purchase contained in section 11 of Ordinance 44 and subsequent acts (par. 16-a of bill), and that charter amendment 264a constitutes both an election in itself to purchase at the appraised value, and also an impairment of the city's obligation to purchase under section 11 of Ordinance 44 (par. 16-c of bill). How section 264a can constitute a contract to purchase, and at the same time impair the obligation of that contract, we do not understand.

It is impossible to determine whether complainant relies upon the contract to purchase claimed to

be contained in section 11 of Ordinance 44 of 1890, or upon that in Ordinance 163 of 1907, or that in charter amendment 264a, or upon all or some of them. Each is alleged to constitute a contract or election to purchase. It will be found necessary, however, to base all of the claims of complainant on section 11 of Ordinance 44, for we shall demonstrate later that Ordinance 163 of 1907 was and is utterly ineffectual for any purpose in this case, and that section 264a has no bearing upon the issues of this suit, unless it in some way impairs the obligation of some contract previously existing. If, then, it is found that Ordinance 44 did not bind the city to purchase in the event it did not renew, then Ordinance 163 does not; for it is not claimed to have any virtue save as it is based upon and relates to Ordinance 44.

Ordinance 163 is a law passed by the city and accepted by the water company, whereby the city is given the right to have an appraisement made of the value of the water company's plant prior to the expiration of Ordinance 44, and then to submit the proposition to purchase, at the value fixed by such appraisement, to the voters at a *special election*, together with the proposition of granting the water company a new franchise. Section 264a created a public utilities commission, giving it the powers over all public utilities theretofore exercised by the board of public works, and authorized them to offer the water company $7,000,000 for its plant, and, if refused, to submit the question of issuing bonds to erect a municipal plant to a popular vote. Neither Ordinance 163 nor section 264a suggests any election to buy the water plant, except in pursuance of the ex-

press conditions therein contained—in the one case, if the voters decided to purchase at the appraised valuation, at a special election at which there should also be submitted the proposition of a new contract for twenty years based upon rates to be fixed by the same appraisers; in the other, if the water company agreed to sell for $7,000,000. Nothing was done under Ordinance 163 except to have the appraisement. The appraisers failed to fix a schedule of rates as required, because it was impossible, and consequently no new contract with rates fixed by the appraisers was or could be submitted to the people, and the proposition to purchase at the appraised value could not be submitted apart from the proposal of a new contract, and the water company refused to accept the offer of $7,000,000 contained in section 264a.

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1. The City's Contention.

In 1889 the General Assembly of the state of Colorado amended the charter of the City of Denver by providing that:

> "All franchises or privileges hereafter granted by the City of Denver to corporations or individuals, shall be limited to twenty years from the granting of the same, and such franchises or privileges so granted shall plainly specify on what particular streets, alleys or avenues the same shall apply to, and no franchises or privileges shall hereafter be granted by the City of Denver in general terms or apply to the city generally." (Sess. Laws Colo. 1889, p. 130.)

On April 10, 1890, the City of Denver (as it then was) enacted what is known as Ordinance 44 of the series of 1890. Section 1 thereof provides that:

> "The right and privilege of laying down, continuing and maintaining water pipes, valves, hydrants and apparatus for the conveyance and distribution of water in, upon, along and through the following streets, avenues, alleys and public places of the City of Denver and additions thereto, to-wit: [here follow the names of streets, etc.], and in, upon, along and through all extensions of said streets, avenues, alleys and public places is hereby granted to The Denver Water Company, its successors and assigns, to such extent as the City may lawfully grant the same, subject to be terminated in the manner hereinafter in this ordinance provided."

Section 5 provides that the rate to private consumers shall not be greater than that then charged by the said company, a schedule of which rates was annexed to the ordinance, and that the company might require any consumer to furnish a meter and to pay for water by meter measurement. It also provides that at any time after five years from date the city council might require said company to fix schedule rates for private consumers equivalent to the average rate prevailing in the cities of Chicago, St. Louis and Cincinnati for the same service. In the action of the City of Denver vs. The Denver Union Water Company, which the city commenced in 1898 to compel the company to specifically perform this last part of section

5, it was decided by the Supreme Court of Colorado in 1907, in 41 Colo., 77, that this provision for fixing rates was unenforceable.

Section 7 provides for the purchase from the city of certain hydrants, and that the company shall set further hydrants as directed by the council.

Section 10 provides for hydrant rentals. Until May 1, 1891, the city shall pay the sum of money mentioned in the contract between the city and the company of May 9, 1874, and during the remainder of the period of twenty years, from and after the date of the passage and approval of the ordinance, the city shall pay for ten years after May 1, 1891, $35 per hydrant per annum, and for the remaining period, until the right of purchase shall accrue, as mentioned in section 11, $25 per annum.

Sections 11 and 12 contain the alleged contract out of which this controversy arises, and are set forth heretofore *in hacc verba* in the "Statement."

Section 13 provides that the company shall, whenever ordered to do so by ordinance, extend its mains.

Section 19 provides that the ordinance when accepted by the company becomes a contract, and it is expressly provided that by the provisions of the ordinance the company "loses no rights in regard to the occupation of the streets, alleys and public places, or as to the rights of any other person or persons thereto which it now possesses, but the same are hereby recognized and confirmed and are to be deemed independent of, not merged in, any grant in this ordinance elsewhere contained."

Section 20 provides that all mains, pipes, valves and other apparatus owned by the company and composing its plant, and all such apparatus as it might

thereafter set in any of the streets, etc., within said city, shall be and remain the absolute and sole property of the company, which shall forever be considered and entitled to be in possession thereof, except in case of purchase by the city under the terms of the ordinance or some agreement between the city and the company, when all rights of whatsoever nature of the company shall vest in the city.

Section 21 provides:

> "While the consideration for the respective agreements of the city and the company are upon each side the several agreements of the other, all of the several grants, contracts and agreements in this ordinance contained are to be deemed independent agreements with the same force and effect as if each section of this ordinance was contained in a separate ordinance by itself."

It is contended by the city that in and by this ordinance there was a franchise granted to The Denver Water Company, predecessor of the water company, to lay and maintain pipes in the city, and to furnish the city and its inhabitants with water at certain rates provided for therein, for the period of twenty years; that at the end of that time the city had the right to purchase "the said works," if it so elected; and that the city also had the right to renew the contract at a lower hydrant rent, if it so elected; but that the city did not bind itself to do either.

At the time this ordinance was passed, The Citizens Water Company was competing with The Den-

ver Water Company in the City of Denver and had laid pipes, etc., practically duplicating the plant of the last-named company. The suburbs of Denver were being supplied by other and independent companies. In 1894 all of the properties of these companies were merged into the ownership of the present company, The Denver Union Water Company, and since 1890 these suburbs have been added to the City of Denver and now compose with the latter the City and County of Denver, which was created by the adoption of Article XX of the constitution.

In 1907, shortly after the decision of the Supreme Court of Colorado in the case of the City of Denver vs. The Denver Union Water Company, 41 Colo., 77, which had dragged its weary way through the courts for nine years, in which the rate-making provision of section 5 of Ordinance 44 was declared unenforceable, Ordinance 163 of the series of 1907 was passed by the city and accepted by the company.

It is the contention of the city that Ordinance 44 expired *ex vi termini* on April 10, 1910, but prior to that date and in October, 1907, Ordinance 163 was passed and became effective. Ordinance 163 provides for the appointment of appraisers to ascertain and report the value of the water system of the water company and its allied and auxiliary corporations and associations, and also to ascertain and report a schedule of fair, just and reasonable rates, to be set forth in a proposal to be made by the water company to the city for a new franchise and contract, and the ordinance required that the proposition to purchase at the appraised value, and the question whether the city should purchase the property, rights, etc., of The

Denver Union Water Company, and the question whether it should grant a new contract to the company, be submitted to a vote of the people of Denver; the city having the right, however, to refuse to do either. It expressly provides that the appraisement of the property shall be made in the same manner as provided in Ordinance 44 of 1890; but there the resemblance between the two ordinances ends.

Under Ordinance 44 of 1890 the property to be appraised was "the said works," being certain property of The Denver Water Company, grantee in the ordinance, lying wholly within the city limits. Under Ordinance 163 of 1907 the appraisers were to fix the value of

> "the property, business and rights so owned or used by The Denver Union Water Company, party of the second part, its allied and auxiliary corporations and associations and persons connected with it aforesaid, by which said Company, at the present time, supplies water to the said City and County of Denver, party of the first part, and its inhabitants, or to any one else at any place whatever for domestic, manufacturing or irrigating purposes, and which shall constitute and include all the property, rights and privileges of every kind and nature whatsoever acquired by said party of the second part from its predecessor, The Denver Water Company or from any person or corporation whatsoever, whether the legal title be held by said The Denver Union Water Company or by some other person; and also all property, real

> or personal, easements, rights and privileges, and contracts of every and all nature and kind whatsoever acquired by said party of the second part, its allied and auxiliary corporations or associations or persons connected with it since their respective incorporations which are in any way connected with or relate to said water plant of said The Denver Union Water Company, or held by its allied or auxiliary corporations or associations or persons connected with it or necessary or useful for its protection, maintenance and operation."

It is contended by the city that the property which it is given a right to purchase in and by Ordinance 163 is not the same as the property on which the city is given an option in Ordinance 44. There is a startling difference between "the said works," being "water pipes, hydrants and apparatus" for the conveyance and distribution of water in, upon, along and through certain streets, etc., and the exhaustive category of property, franchises, rights and easements owned or used by The Denver Union Water Company and its auxiliary corporations, associations and individuals, including, as it did, not only "the said works" of the old Denver Water Company, which was the subject of the ordinance of 1890, but the numerous plants acquired from companies that had supplied suburban towns, and also the property of The South Platte Canal and Reservoir Company, bonded for $4,000,000, and also the plant of The Citizens Water Company, which was from 1889 to 1894 a vigorous competitor

of The Denver Water Company and which eventually drove the latter into insolvency.

Under the provisions of Ordinance 163 of 1907, an appraisement of the property specified therein was made, but it is contended by the city that by the terms of that ordinance that appraisement was expressly made tentative and merely the basis of a submission to the qualified electors of the City and County of Denver at a special election to be called for that purpose, and also for the further purpose of voting on the question of making a new contract with the water company based upon a table of rates to be fixed by the same appraisers; either or both of which propositions could, by the express provisions of the ordinance, be rejected by the electors. The appraisers did not fix the table of rates provided for, and declared their inability so to do. Consequently no election was called, as it was impossible to carry out the provisions of Ordinance 163. It is the contention of the city that this appraisement became of no effect, and may be disregarded. It is contended by the trust company that this appraisement was the same appraisement provided for in Ordinance 44 of 1890, covered the same property, and that the city has become obligated to purchase all of the property designated in Ordinance 163 at the valuation fixed by the appraisers, by reason of the city's agreement contained in Ordinance 44. The City contends that these two ordinances cannot be so construed. The city, believing that Ordinance 44 of 1890 had expired, and that Ordinance 163 of 1907 was wholly ineffectual and impossible of performance by either party, made an effort, by the adoption of section 264a, an amendment to its charter, to purchase the property of the water company, or, failing in that,

to construct a municipal plant. The water company refused to accept the offer contained in section 264a, and thereupon the officers of the city called an election to authorize bonds for the construction of a municipal system, whereupon this suit was brought, and although the election was not enjoined, the city was restrained from taking any steps looking to the issuance of bonds or the construction of a municipal water system. The election resulted in a large majority for a municipal plant.

The city's position is that there are no contract relations between it and the water company, and no duty or obligation owing from it to that company; that the water company's franchise has expired, and that the city has a right (which it had even before the expiration of the franchise, which was not exclusive) to build its own plant. It is not interfering with the water company's property, or its use or occupation of the streets, or its operation of its works. The city is merely attempting to do what it could have done at any time after Ordinance 44 was adopted —namely, build its own plant—and it contends it should be permitted to do this even though it has agreed to purchase the water company's plant, as the trust company contends, or to renew the franchise, as the water company claims.

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2. THE COMPANY'S ALLEGED RIGHTS UNDER THE CONTRACTS OF 1870 AND 1874.

We think we are justified in saying that all the rights of the water company claimed in this case are founded upon Ordinance 44 of 1890. Counsel for the

water company have argued, and doubtless will insist (although the trust company does not), that the company has certain rights under the contracts of 1870 and 1874, which are found at pages 194 and 207 of the printed record. Those rights are called "street rights" by counsel for the company, but no contention is made that any *exclusive right* or franchise now exists, or has existed in the water company since 1891, by reason of those contracts or either of them. But the fact is that the city is not interfering in any manner with the so-called "street rights" of the water company, nor with any of its property, nor even with its right to operate its complete waterworks system within as well as without the limits of the City and County of Denver. What the city is trying to do is to construct a municipal plant, and the water company and the trust company are trying to prevent it from so doing.

The water company has no *exclusive* franchise; nor does the bill claim one for it; nor has the city attempted to grant one to it; nor had the city power to do so, if it so desired. Neither has the city agreed not to enter into competition with the water company. Hence the construction of a municipal plant cannot interfere in any way with any "street rights" which the water company may possess by virtue of the contracts of 1870 and 1874.

Nor does the trust company allege or argue that the water company has any rights arising out of the contracts of 1870 or 1874.

But assuming that the water company is entitled to the "street rights" it claims in perpetuity, there is no limitation imposed thereby on the city's right to

construct a municipal plant. That right can only be restricted by contract.

Helena Water Works Co. vs. Helena, 195 U. S., 383.

Skaneateles Water Works Co. vs. Skaneateles, 184 U. S., 354.

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3. SECTIONS 11 AND 12 OF ORDINANCE 44 OF 1890.

The main issue in this case is the construction to be given Ordinance 44, and particularly sections 11 and 12 thereof, which are above set forth. Do they constitute a contract on the part of the city either to renew the water company's franchise or else to purchase its plant? Or do they reserve to the city the right to purchase the works if it desires, and the right to renew the contract if it desires, and also the right to refuse both to purchase and renew? The construction placed upon these sections by the Circuit Court of Appeals, we contend, is not justified by the canons of construction which have been laid down by this court in a long and unbroken line of decisions, beginning with Charles River Bridge Co. vs. Warren Bridge, 11 Peters, 420. Those rules are that every ambiguity contained in a public grant must be construed in favor of the public; that if two constructions can be given to the act containing the grant, it must receive the one more favorable to the public.

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a. The Canons of Construction Applicable in Case of Municipal Franchises.

In construing grants of franchises, this court has recently said:

"The rules of construction which have been adopted by courts in cases of public grants of this nature by the authorities of cities are of long standing. It has been held that such grants should be in plain language, that they should be certain and definite in their nature and should contain no ambiguity in their terms. *The legislative mind must be distinctly impressed with the unequivocal form of expression contained in the grant*, in order that the privileges may be intelligently granted or purposely withheld." (italics ours.)

Cleveland Elec. Ry. Co. vs. Cleveland,
204 U. S., 116, 129.

The above merely amplifies

"the established rule that public grants susceptible of two constructions must receive the one most favorable to the public."

Hamilton Gas Light Co. vs. Hamilton,
146 U. S., 258, 268.

The rule has also been stated as follows:

"One who asserts private rights in public property under grants of the character of those under consideration must, if he would establish them, come prepared to show that they have been conferred in plain terms; for nothing passes by the grant except it be clearly stated or necessarily implied. * * * It is enough to deny the privilege contended for if upon considering the act the mind rests

in doubt and uncertainty as to whether they are intended to be conferred."

Blair vs. Chicago, 201 U. S., 400, 463, 467.

As was said in Knoxville Water Co. vs. Knoxville, 200 U. S., 22, 33, quoting from Charles River Bridge vs. Warren Bridge, 11 Pet., 420, 544:

"*any ambiguity* in the terms of such a contract '*must operate against the adventurers and in favor of the public*'" (italics ours),

because

"*it is matter of common knowledge that grants of this character are usually prepared by those interested in them.* * * * This is one among *many* reasons why they are to be strictly construed." (italics ours.)

Blair vs. Chicago, 201 U. S., 400, 471.

And this is said to be a wise doctrine, because

"*it serves to defeat any purpose concealed by the skillful use of terms to accomplish something not apparent on the face of the act*, and thus sanctions only open dealing with legislative bodies." (italics ours.)

Slidell vs. Grandjean, 111 U. S., 412, 438.

See also:

Helena W. W. Co. vs. Helena, 195 U. S., 383, 392.

Long Island W. S. Co. vs. Brooklyn, 166 U. S., 685, 696.

Stein vs. Bienville Water Co., 141 U. S., 67, 80.

Joplin vs. Light Co., 191 U. S., 150, 157.

It was implied by the Circuit Court of Appeals in its opinion that sections 11 and 12 are alternatives, and that their evident purpose was to conserve the rights of the water company in any contingency that might arise at the expiration of the franchise.

But the rules of construction for which we contend, and which are expressly approved by this court, will not permit any such implication or conclusion.

As this court has said:

> "But as we have said, the act upon its face is ambiguous and uncertain. We must judge of it by the terms in which it is expressed. A construction can be given it which would extend all the contracts with the city for the term of 99 years. On the other hand it can be maintained with at least equal force that notwithstanding the Governor's view, it affirmed the contracts as made, thus distinctly recognizing the comparatively short term of 25 years for which they expressly stipulated. It must be, therefore, uncertain whether the legislators voted for this act upon one construction or the other. *It may be that the very ambiguity of the act was the means of securing its passage.* Legislative acts of this character should be in such unequivocal form of ex-

> pression that the legislative mind may be distinctly impressed with their character and import in order that the privileges may be intelligently granted or purposely withheld. It is matter of common knowledge that grants of this character are usually prepared by those interested in them and submitted to the legislature with a view to obtain from such bodies the most liberal grant of privileges which they are willing to give." (italics ours.)
>
> Blair vs. Chicago, 201 U. S., 400, 471.

It has been argued by counsel for the water company, in discussing the proper construction to be placed on Ordinance 44, and particularly sections 11 and 12 thereof, that the making of the contract with the water company was an exercise of the business powers of the city, as distinguished from its legislative or governmental powers, and that as such it is not subject to the rules above stated; but we do not find that this court has ever recognized any such distinction in construing grants of the character here under consideration.

In Knoxville Water Co. vs. Knoxville, 200 U. S., 22, the argument was made by the company that, as the contract in question was the exercise of a business power of the city, it was subject to the same construction as the contract of an individual. This court, after citing authorities as to the rule of construction applicable, said (p. 34):

> "It is true that the cases to which we have referred involved in the main the con-

> struction of legislative enactments. But the principles they announce apply with full force to ordinances and contracts in respect of matters that concern the public. The authorities are all agreed that a municipal corporation, when exerting its functions for the general good, is not to be shorn of its powers by mere implication. If by contract or otherwise it may, in particular circumstances, restrict the exercise of its public powers, the intention to do so must be manifested by words so clear as not to admit of two different or inconsistent meanings."

In Omaha Water Co. vs. Omaha, 162 Fed., 225, the court was compelled to recognize the difference between a contract by a city for a water supply and an agreement between private parties. In the same case in this court (Omaha vs. Omaha Water Co., 218 U. S., 180) the distinction was made by this court which it has always made between matters of public and those of private concern, although it was then argued in this court by counsel for the city that contracts between cities and water companies are subject to the same rules as business contracts between private individuals, and in support of this contention, among other cases, were cited:

> Illinois Trust and Savings Bank vs. Arkansas City, 76 Fed., 271; and
>
> Omaha Water Co. vs. Omaha, 147 Fed., 1.

This court restated the rule of law in Vicksburg vs. Water Works Co., 202 U. S., 453, 469, as follows:

> "In considering this contract we are to remember the well-established rule in this court which requires grants of franchises and special privileges to be most strongly construed in favor of the public, and that where the privilege claimed is doubtful, nothing is to be taken by mere implication as against public rights. This rule has been applied to a series of contracts in water works and lighting cases, and we have no disposition to detract from its force and effect. And unless the city has excluded itself in plain and explicit terms from competition with the Water Works Company during the period of this contract it cannot be held to have done so by mere implication. The rule, as applied to waterworks contracts, was last announced in this court in Knoxville Water Company v. Knoxville, 200 U. S. 22, decided at this term, citing previous cases."

This court has never, so far as effect or construction is concerned, held that contracts for water supply are not subject to the rule that nothing is to be taken against a municipality by implication, and that any ambiguity is to be resolved in favor of the public. In fact, this rule has been recognized and stated oftener in cases arising out of contracts made between municipalities and public-service corporations than in any other class of cases.

If sections 11 and 12 are ambiguous in their language, no court is justified in giving them an interpretation which works to the disadvantage of the pub-

lic; and, *a fortiori,* where the two sections are not stated to be in the alternative in apt language, as in this case, where there is no suggestion even from the context that the city intended to obligate itself either to purchase or renew, the claim of right against the public must be denied.

The law, where the language of the grant is plain, has been thus stated by this court:

> "If ambiguity is fatal to such claim of rights as against the public, for the stronger reason must such grants of far-reaching and exclusive privileges as are here asserted fail when they can only be maintained by strained construction in their favor."
>
> Blair vs. Chicago, 201 U. S., 400-473.

> "Where a law is expressed in plain and unambiguous terms, whether these terms are general or limited, the legislature should be intended to mean what they have plainly expressed and consequently no room is left for construction."
>
> Lake County vs. Rollins, 130 U. S., 662, 670, 671.

There is no ambiguity in the provisions of sections 11 and 12. One gives the city the right to purchase at the end of twenty years, *if it so elects;* the other, the right to renew the franchise, *if it so elects.* If may do either, if it so elects, and there is nothing in the ordinance expressly or by implication denying the right of the city to refuse to do both.

The Circuit Court of Appeals conceded that section 11, standing alone, imposed no obligation upon the city to purchase. It is equally clear that section 12, standing alone, imposes no obligation upon the city to renew. We are unable to reconcile these facts with the conclusion that, because both are embodied in the same ordinance, their combined effect is to impose an obligation upon the city to do one or the other, because there are no express words making these two sections alternative propositions, because the law will not permit an implication that they are alternatives, and also because section 21 of the ordinance declares them in express terms to be independent of each other.

Conceding, for argument's sake, that these sections are capable of two constructions, the authorities cited require the adoption of that one which is more favorable to the public.

> "If the contract under which the plaintiff claims was doubtful in its meaning, the result would not be different; for, while it is the duty of the courts not to defeat the intention of parties to a contract by a strained interpretation of the words employed by them, it is a settled rule of construction, that, 'in grants by the public nothing passes by implication;' and, 'if, on a fair reading of the instrument, reasonable doubts arise as to the proper interpretation to be given to it, those doubts are to be solved in favor of the State; and where it is susceptible of two meanings, the one restricting and the other extending the powers of the corporation, that construc-

> tion is to be adopted which works the least harm to the State.' The Binghamton Bridge, 3 Wall. 51, 75."
>
> Stein vs. Bienville Water Supply Co., 141 U. S., 67, 80.

And this means that the city should prevail in its contention that it may do the one thing or the other, if it so determines, but is not bound to do either.

It should be noted that sections 11 and 12 only reserve rights or options to the city.

> "No canon of construction is familiar to the court which transforms plain and unambiguous language permitting an act to be done into a positive command to do the act."
>
> Colby University vs. Canandaigua, 96 Fed., 449, 451.

Such also is the decision of the Court of Appeals in the Eighth Circuit, in construing a section of an ordinance practically identical with section 11 of Ordinance 44:

> "The agreement of the company that the city should have the option to purchase them at an appraised value was an inseparable part of this original contract. It was a continuing and irrevocable offer of the water company to sell."
>
> Castle Creek Water Co. vs. Aspen, 146 Fed., 8, 10.

And in the case at bar the Circuit Court of Appeals conceded that section 11, standing alone, imposed no obligation upon the city to purchase.

> "If section 11 stood alone in the ordinance it would seem clear that the city might do as it pleased, purchase or not purchase, whatever the circumstances."
>
> City and County of Denver vs. New York Trust Co., 187 Fed., 890, 896.

> "The proviso in subdivision 4, requiring that in any grant of authority by the village there should be a provision for the sale of the works to the village at any time after 15 years, has no bearing upon the question under consideration. The proviso requires that the right to purchase shall be a condition of the grant. It imposes no requirement or duty to purchase, and does not justify the inference that the village could only provide itself with waterworks by purchasing from the company."
>
> Long vs. Duluth, 49 Minn., 280.

> "It is, however, urged that the city can avail itself of no means, other than that through the plaintiff, to obtain any water supply, except by resuming and taking its property and powers in the manner prescribed in one of the sections 26 and 29 of the plaintiff's charter, to which reference has already been made. It appears that those

provisions were inserted in the charter at the suggestion or request of the common council of the city; and that was evidently done to enable it, in the event referred to in the one, and on the expiration of the time mentioned in the other, section, if the interest of the city should require it, to take the matter of its water supply into its own management and control. It is not seen that this right, reserved to the city, has any essential bearing upon the question of the construction of the grant to the plaintiff. It simply gave the city the opportunity, in the events provided, to become possessed of the property which should constitute the plant of the plaintiff, and be applied to the service of furnishing water to the city. This right was not made a legal duty, upon the performance of which was dependent the power to use means other than through the plaintiff to obtain further means of water supply for the city. It was a privilege, merely, which it might or might not exercise at pleasure."

Syracuse Water Co. vs. Syracuse, 116 N. Y. 167.

"Nor can it be successfully maintained that the city by virtue of its contract or of the statute became under any obligation to purchase the water plant which had been erected. By the contract it simply reserved an option to purchase, and it nowhere bound itself, either in express terms or by

reasonable implication, to exercise that option. The contract therefore imposed upon the city no requirement or duty to purchase."

Thomas vs. Grand Junction, 13 Colo. App., 80, 89.

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b. The Construction in the Light of Section 21 of the Same Ordinance.

Section 21 of Ordinance 44 of series of 1890, of which sections 11 and 12 are part, provides:

> "While the consideration for the respective agreements of the city and the company are upon each side the several agreements of the other, all of the several grants, contracts and agreements in this ordinance contained are to be deemed independent agreements with the same force and effect as if each section of this ordinance was contained in a separate ordinance by itself."

Can anything be clearer than this expression of the intent of the parties? In view of the recitals of this section, to construe sections 11 and 12 as alternative obligatory agreements, to make section 12 dependent upon section 11 or *vice versa*, is to do violence to the intention and purpose of the parties as embodied in the agreement itself.

This alone should be conclusive of the correctness of the construction contended for by the city, and should determine beyond peradventure that sec-

tions 11 and 12 are not to be regarded as stating agreements by the city, one or other of which it is obliged to perform, but rather as being each an independent agreement, with the same force and effect as if it were "contained in a separate ordinance by itself."

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c. The Construction Contended for by the Companies Would Make the Contract Ultra Vires and Void.

The construction of sections 11 and 12 contended for by counsel for the water company and for the trust company, that the city must either purchase or renew, if adopted, would render the agreement *ultra vires* and void. The City of Denver had no power to make such a contract. It had the power

> "to provide the City with water, to erect hydrants and pumps, to construct cisterns, to provide for and regulate water for irrigation purposes and other purposes, to regulate and provide for the construction of ditches, canals, conduits and gutters for conducting and distributing water through the city, and to keep the same in repair, and to acquire and own stock in any ditch company, the ditch of which supplies any part of the city with water for irrigating or domestic purposes, to regulate the use of water by the inhabitants of the city for irrigating the soil; to build and construct reservoirs for the storage of water, and ditches outside of the city limits, for the purpose of bringing water from streams and such reser-

voirs into the city for the use of the inhabitants thereof, in such way and manner as shall be deemed for the best interests of the city, and to keep the same in repair; and to acquire by purchase or condemnation proceedings under the general laws of the State water and ditch rights, and sites for parks and public buildings within the city or between the city and the source from which the water is taken, and to such condemnation proceedings the possession of franchises by any water or ditch company shall be no bar upon the legal compensation being tendered and paid; to bore artesian wells for the purpose of obtaining water for the city at such places within or without the city as may be procured for that purpose; and prevent the wasting of artesian water from private wells; to construct or purchase water works for the use of the city, and to enlarge their capacity from time to time and keep the same in repair, and generally do whatever may be needful and necessary to be done in order to supply the City with water for fire, irrigating, domestic and other purposes and regulate the the same."

Session Laws Colo. 1889, pp. 128, 129.

And this is all. It had no power to agree to either purchase or renew at the end of twenty years. Such a power does not come within those laid down by Judge Dillon and approved by this court.

> "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation,—not simply convenient, but indispensable."
>
> 1 Dill. Mun. Corp. (5th Ed.), sec. 237.

No such power is expressly granted, as the above quoted statute shows. Nor is it indispensable, for many other cities have obtained water supplies without making such an arrangement, and there is nothing to show that the conditions in Denver were exceptional. Nor is it necessarily or fairly implied in or incident to the power expressly granted to the city to provide itself with a water supply. Hence we conclude that such a contract would be *ultra vires.*

We have stated above what we believe to be the true construction of the contract: that the city reserves the right to buy, if it so elects, at the end of twenty years, and the right to renew the contract at a reduced rental, if it so elects; but that it has in no event obligated itself to do either. Such an agreement is within the powers of the city. The twenty-year limitation was imposed upon the contract by the city charter. Shortly before the enactment of Ordinance 44 of 1890 the General Assembly of the

state of Colorado amended the charter of the City of Denver, by providing that

> "all franchises or privileges hereafter granted by the City of Denver to corporations or individuals shall be limited to twenty years from the granting of the same, and such franchises or privileges so granted shall plainly specify on what particular streets, alleys or avenues the same shall apply to, and no franchises or privileges shall hereafter be granted by the City of Denver in general terms or apply to the city generally."
>
> Sess. Laws Colo. 1889, p. 130.

It is contended by counsel that the Court of Appeals of Colorado has decided, in the case of City of Denver vs. Hubbard, 17 Colo. App., 346, that this charter provision does not apply to the contract for service; that it was a limitation applicable solely to the grant of street rights. Such, however, is not the case. The court (which, by the way, is not the highest court of the state) was considering the effect of a charter provision forbidding the council to make any contract imposing upon the city any liability to pay money until a definite amount of money should have been appropriated for the liquidation of the debt, and held that such a contract did not come within the purview of the charter. It was also contended that the constituional limitation on the amount of the indebtedness of cities was violated, because the aggregate amount of the annual payments brought up the debt to an amount in excess of the limit. This, too, the court overruled. Finally, it was claimed that the

city had no authority to contract for any term of years beyond one, and that ten years was an unreasonable length of time. **The court says (p. 365):**

> "It is true that the city was not given by its charter power to contract for lighting for any term of years, nor was it restricted or limited to any particular term."

On this last phrase counsel base their argument. It is evident that the court was considering merely the grant of power in the charter to contract for lighting; it is further clearly evident that it did not consider that section of the city charter which we have above quoted, and that the same was probably not called to its attention. The very words on which counsel rely, *"nor was it restricted or limited to any particular term,"* show that the above section was not considered. Not one word is said anywhere in the opinion about this section, and, in fact, as the contract for lighting was for a period of only ten years, it is not strange that a charter provision limiting the granting of a franchise to a period of twenty years should be neither cited nor considered.

But it is held by the Circuit Court of Appeals, in its opinion heretofore rendered in this case, that the city had power to bind itself in 1890 by contract to purchase the water company's plant in 1910; that on April 10, 1910, it had the power to renew the company's contract, and if it did not exercise this power it became obligated to purchase, and that such is the true meaning of sections 11 and 12; i. e., that the city could purchase the company's plant at the expiration of the franchise, or, failing to do so, would renew

its franchise. Surely this is a dangerous doctrine. We can find no authority to support such an assumption, and we deny that it exists as a general municipal power, and that any constitutional or statutory warrant exists for its exercise.

We have heretofore shown that the distinction sometimes made between the governmental and the business powers of a city does not create any difference as to the rules of construction applicable to acts done under those powers. We are concerned here with another phase of this same question; for if a contract for a water supply is an exercise of the city's business powers, and if a city council can bind its successors in exercising those business powers, the finding of the Circuit Court of Appeals as to the power of the council in 1890 to bind the city to purchase in 1910 has some support.

It is not denied that a city council may grant a franchise to a water company for a period of twenty years, nor that it may contract for a water supply for a like period, agreeing to pay an annual rental for hydrants; but these acts commence *in præsenti* and continue until the expiration of the term, when the city is released, and are very different in their nature from an act which binds the city at the expiration of the period to do something the effects of which continue for all time. The right to grant a franchise and contract for a water supply depends upon the statute authorizing it. There is no analogy between this right and the right to purchase.

Even though the power is broadly granted to the city to provide itself with a water supply, this is not broad enough to include the power to contract for a

purchase of waterworks twenty years in advance. The City of Denver undoubtedly could exercise its discretion as to what means it would employ in providing itself with water—whether it would construct a plant or grant a franchise to a private corporation. But an agreement to purchase a plant at the end of twenty years is so extreme, so different—not in degree, but in kind—from other rights, the exercise of which has been justified under a broad grant of power, that we do not believe it can be upheld. It has been frequently held that under a broad grant of power a city cannot grant an exclusive franchise without express legislative authority, and certainly the power contended for in the case at bar is a more dangerous one, and one which limits more completely the city's right of choice, than an exclusive franchise.

There are several cases which have been heretofore cited by counsel as supporting their contention that the city had such a right, but in three of them,

> National Water Works Co. vs. Kansas City, 62 Fed., 853; 65 Fed., 691;
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> Los Angeles vs. Los Angeles Water Co., 88 Fed., 720; 103 Fed., 711; and
>
> Stein vs. Bienville Water Supply Co., 34 Fed., 145,

the act of the city agreeing to purchase at the end of twenty years was expressly authorized by the legislature; and in the fourth case,

> Duluth vs. Duluth Gas and Water Co., 45 Minn., 210,

while a contract of this nature appeared in the action, its validity was not passed on, nor was it even necessary to consider it. In

> Clay Center vs. Light & Power Co., 78 Kan., 390,

the Supreme Court of Kansas, where a statutory limitation existed similar to that here involved, forbidding the grant of a franchise for a longer period than twenty-one years, and the ordinance provided that,

> "if at the expiration of twenty-one years the city shall refuse to grant a further continuation of these privileges the city shall purchase," etc.,

the court held the agreement void because the provision was an indirect attempt to evade the statutory limitation. A writ of error was sued out of this honorable court to the Supreme Court of Kansas and was dismissed (212 U. S., 564). The ordinance in that case provided in express terms what in the case at bar it is attempted to have implied.

With all respect, we venture to affirm that no such extraordinary and far-reaching power in a municipality should be recognized unless expressly conferred by the General Assembly, or by the constitution, in unequivocal terms. If the City of Denver can bind itself absolutely to purchase a water plant twenty years hence, it can at the same time bind itself to pay twice or ten times its value, or in the alternative to renew the company's franchise. It can tie the hands of all succeeding and intervening councils. It can agree to take all extensions and improvements, together with antiquated or outworn equipment and

useless appurtenances. It can make similar contracts with light companies and telephone companies. It can by this means disregard such limitations as existed in the Denver charter upon the power to contract debts in advance of appropriations made therefor. It can bind itself to renew a twenty-year franchise by agreeing in the alternative to perform some even more unfavorable or even impracticable act, and thereby do by indirection what it is expressly forbidden to perform. Indeed, it becomes possible through the existence of such a power to mortgage another generation by scores of contracts of purchase and without reference to the public needs.

And if such a power exists, why limit its exercise to twenty years? No reason is perceived for this. The city might with equal power and propriety have agreed to purchase fifty or a hundred years after date, and, because it has power to do so, have also agreed to renew the franchise from time to time until the day of payment arrived. Judge Dillon told us long ago that councils could not conclude their successors by actions such as this, nor exceed the charter limitations upon expenditures, nor exercise any authority not specifically granted or necessarily implied for the requirements of municipal government. The reasons he gave for these fundamental propositions seem quite as convincing in this twentieth century as they did thirty years ago. The authority to make such a contract did not exist, and we trust it never will be conferred. The foundation of the court's opinion is of sand, for the assumption finds support upon no principle or decision we have been able to discover.

If it be true that our municipalities may contract to purchase an extensive water system twenty years

after date thereof, and may utilize the power to neutralize a charter prohibition against the grant of a franchise for a longer period, then they are clothed with an authority most dangerous and menacing to the public welfare. This doctrine must undo what years of judicial decisions have accomplished for the emancipation of cities from venal councils controlled by more venal public-utility corporations. Did no other reason exist to challenge its soundness, the enormity of the abuses to which its exercise is susceptible would be sufficient.

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d The Construction Contended for by the Water Company Would Limit the City's Power to Acquire a Water Plant.

The court's position amounts to a restriction on the city's power to provide itself with a water supply by limiting such supply to one particular plant. The grant of the power to limit itself in this respect and the exercise of the power must both appear expressly or by necessary implication.

At least this is the rule laid down in Los Angeles vs. Los Angeles Water Co., 177 U. S., 558, and in Freeport Water Co. vs. Freeport, 180 U. S., 587. And in Home Telephone Co. vs. Los Angeles, 211 U. S., 265, 273, this court said:

> "But for the very reason that such a contract has the effect of extinguishing *pro tanto* an undoubted power of government, both its existence and the authority to make it must clearly and unmistakably appear

and all doubts must be resolved in favor of the continuance of the power."

The court was referring to the power to regulate rates, but the reason is equally applicable to a case like the one at bar; for, as the greater includes the less, if the power to regulate water rates is a governmental power, as it is incident to and a part of the power of the city to supply itself and its inhabitants with water, that power, too, must be a governmental power.

Needless to say, no authority to so restrict its powers appears in the charter of Denver, or the constitution or statutes of Colorado, either expressly or by necessary implication.

In Joplin vs. Light Co., 191 U. S., 150, the court said that "the limitation contended for [on the city's right to supply itself with an electric-light plant] is upon a governmental agency" (p. 156); so we believe it follows that, while making a contract for a supply of water for a period of years may be the exercise of the business power of the city, yet the power to supply itself and its inhabitants with water is a governmental power, "and restraints upon that must not be readily implied." (Joplin case, p. 156.)

The case of Knoxville Water Co. vs. Knoxville, 200 U. S., 22, holds that the power to furnish itself with a water supply is conferred upon the city solely for the public good. Where it is claimed, as here, that the city has absolutely bound itself to purchase the water company's plant, or to renew its franchise, to the exclusion of any other method of acquiring a water supply, the case becomes identical in principle

with the Knoxville case, and should be similarly decided.

In Water, Light & Gas Co. vs. Hutchinson, 207 U. S., 385, it was contended by the company's counsel (and at the head of them was Judge Dillon) that under the Kansas statutes authorizing cities of the second class "to provide for and regulate the lighting of the streets," etc., and "to make all contracts and do all other acts necessary to the exercise of its corporate or administrative powers," and under the general-welfare clauses and cognate provisions of the statutes, such cities have power to make exclusive contracts with a company to light the streets. This court held to the contrary, saying:

> "To hold otherwise would impugn the cited cases and their reasoning. It would destroy the rule of strict construction. The foundation of that rule requires the grant of such power to be explicit—explicit in the letter of the grant—or if inferred from other powers or purposes, to be not only convenient to them but indispensable to them. And these conditions are imperative—too firm of authority to be disregarded upon the petition of equities however strong." (p. 397.)

Section 25 of Article V of the constitution of Colorado provides:

> "The general assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * granting to any corporation, association or

individual any special or exclusive privilege immunity or franchise whatever."

Under the general rules of construction, and under the interpretation of this provision adopted by the Supreme Court of Colorado in Leadville vs. Sewer Co., 47 Colo., 118, this inhibition applied not only to grants by the General Assembly, but also to grants by municipalities; nor does the constitution or statutes empower the city to grant what would be in effect an exclusive franchise by agreeing to purchase the grantee's works at the expiration of the franchise period, which would enable the city to do by indirection what it was expressly denied the power to do. If a legislative grant of power to a municipality must be strictly construed; if every power claimed must be explicitly granted, or, if inferred, be indispensable, not merely convenient, then the statutes of Colorado did not authorize the city to agree to purchase the water company's system at the end of twenty years. The charter of Denver in force in 1890 gave the city the power "to provide the city with water," etc., and the powers granted the city council included the power "to construct or purchase water works for the use of the city" (Sess. Laws Colo. 1889, pp. 124-128).

Can the power to agree to purchase the plant of a water company, to which the city has granted a franchise, at the end of twenty years, be inferred from these grants of power, any more than the power to grant an exclusive franchise could be inferred in the Hutchinson case? Is such a power indispensable—not simply convenient, but indispensable—to the power of providing the city with water, or the power to construct or purchase waterworks for the

use of the city? If it is indispensable, it is more than strange that no other city has ever been compelled to do it.

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c. The Construction of the Contract in the Light of Ordinance 163 of 1907.

The property of The Denver Water Company was sold under a foreclosure sale in 1894, and together with the property of The Citizens Water Company, which was a competitive organization that had been supplying Denver and its suburbs with water since 1889, and that of some suburban companies, were all merged into The Denver Union Water Company.

In 1907 an ordinance was passed by the city and accepted by The Denver Union Water Company, known as Ordinance 163, and set forth on pages 69 et seq. of the printed record. It is recited in that ordinance

> "that in view of the shortness of the time which will elapse before the appraisers are to be appointed under and in accordance with the terms of the contract of April 10, 1890, the said The Denver Union Water Company is unwilling to expend large sums of money in building pipes and conduit lines for use in the future and after the arrival of the time when the said City and County will have the right to purchase said plant under appraisement, in view of the existing uncertainty as to whether the City will exercise its right and option to purchase said plant at said time." (Record, p. 71.)

This ordinance provides for a method of submitting the question of the city's acquiring the company's plant *after* an appraisement instead of *before,* as provided in Ordinance 44 of 1890, or to make a new and different contract with the city, the city having the right to do one or the other, or *neither;* and this was apparently with no idea on the part of either party that the agreements of the city contained in Ordinance 44 as to purchasing or renewing were modified. The property which was to be appraised under Ordinance 163 was much more extensive than that covered by Ordinance 44, including all of the property owned *or used* by The Denver Union Water Company or any auxiliary corporation or person, and whether the property, rights and franchises were acquired from The Denver Water Company or from any other person or corporation. Under the provisions of this ordinance, an appraisement was made, but the question of purchase was never voted on, as the ordinance also required a proposition for a new contract to be voted on at the same election, such proposition to be based upon a table of rates to be fixed by the same appraisers. This table of rates they failed to fix, and reported that they were unable to do so; and hence no election could be or was held.

It was therefore impossible to carry out the plan of settlement provided by Ordinance 163. This ordinance clearly shows, however, what the parties thereto, as late as 1907, understood what their legal status under Ordinance 44 was. It shows conclusively that the water company did not believe that the city was compelled either to renew or purchase. Else why should it be "unwilling to expend large sums of

money * * * in view of the existing uncertainty as to whether the city will exercise its right and option to purchase said plant at said time"? For if the alternative to the city's purchasing was the renewal of the franchise for twenty years, why should the company be unwilling to expend large sums of money?

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f. The Construction of the Contract According to the Natural Meaning of Its Text.

We desire to call to the attention of this court the extreme radicalism necessary to give these sections the construction contended for by the water company. It is not a mere case of construing the word "may," where it appears in the ordinance, as "must;" for if the city "must" purchase, it "must" also renew. It involves injecting forcibly into the ordinance an entirely new sentence, or possibly an entirely new section, declaring the two sections to be mutually dependent on each other, and that if one is not performed the other shall be. *It also requires section 21 to be entirely disregarded.* Surely no court is justified in making an entirely new contract between the parties, and even if it did add such provision, the contract becomes hopelessly involved.

Assuming for the instant that the city is required by the terms of sections 11 and 12 either to purchase or to renew, what is the effect of section 12 if the city did not purchase on April 10, 1910? Under any possible construction of the ordinance, this is the only time when the city could purchase. It is contended by the water company that, if the city did not pur-

chase on that date, the water company is entitled as a matter of right to a renewal every twenty years—presumably forever. Such a contract, we contend, would be void, especially in the face of the charter limitation of twenty years. It is said by the water company that, while such is their contention, it is not necessary to pass on this question at this time. That is true, and yet the construction that may be given to this ordinance eventually is important as showing what the ordinance really means. Although the city may not be required to do anything illegal or *ultra vires* at present, if it will be required to do so at some future date, a construction which would lead to such result is utterly indefensible. Courts always try to construe a statute or an ordinance so as to give it a legal effect rather than otherwise. The construction of section 12 contended for by the water company is, we believe, perfectly reasonable, assuming that sections 11 and 12 be construed as requiring the city either to purchase or to renew; but surely the result attained—i. e., that the company is entitled to perpetual renewals in case the city fails to purchase on April 10, 1910—in the face of the twenty-year limitation contained in the charter, demonstrates that the construction of sections 11 and 12, to the effect that they impose alternative obligations on the city, is incorrect.

The contract, giving its words their usual common-sense meaning, is clear. The city reserves the right to purchase the waterworks system at the end of twenty years, at a valuation to be agreed upon between the parties, or, in event of their failure to agree, to be fixed by appraisers. It also reserves the

right at that time to renew the contract *at a lower hydrant rental* than that provided for in the ordinance.

Section 5 reserved to the city the control of rates, and the language of section 12 shows the desire of the city to retain this control. Those rates were to be fixed by taking an average of the rates in three cities. The Court of Appeals asks why the right of election to renew the contract was reserved in section 12, twenty years in advance of its expiration, unless intended as an alternative of a purchase. The reason is clear; the renewal was to be at a lower hydrant rental.

When, however, the city attempted to enforce its right, the water company contended that provision to be impracticable and unenforceable, and the Supreme Court of Colorado, in City of Denver vs. Denver Union Water Co., 41 Colo., 77 (a suit begun in 1898, but not finally decided until 1907, when the contract had but three more years to run), sustained its contention. Immediately after this decision Ordinance 163, heretofore referred to, was enacted and accepted by the water company.

In view of the fact that sections 11 and 12 are practically identical in their language, so far as their creating any duty upon the part of the city or reserving any right to it is concerned, it seems strange that the Circuit Court of Appeals should construe section 11 as stating a duty on the part of the city, while section 12 is held only to reserve a right to it which it might exercise or not. It will be seen that the Court of Appeals decided the case on different grounds from those set forth in the bill or the cross-

bill, and on which those pleadings were based. The trust company alleged that the city had elected to purchase under section 11, but had refused to pay. The water company alleged that alternative agreements were stated in sections 11 and 12, one or other of which the city was required to perform; that it had failed to purchase and pay under section 11, and consequently was obliged to renew under section 12. While the Court of Appeals held that sections 11 and 12 create an obligation on the part of the city to purchase the water company's plant, if it did not renew its franchise, still it held that it had neither elected to purchase nor to renew.

This was doubtless based upon the conception of the Circuit Court of Appeals, before stated, that the city had the power in 1890 to agree to purchase in 1910. That court says that it did not agree absolutely in 1890 that it would purchase in 1910, but states that it agreed that it would purchase in 1910 if it did not renew.

It seems to us that if sections 11 and 12 state alternative agreements, one or other of which the city was required to perform, they state agreements which were equally binding upon and effective against the city, and that one was as binding upon the city as the other. There is nothing in the language of these sections to show that the city was not as much—or as little—bound by section 12 as it was by section 11. These propositions are of equal force, if they are binding at all on the city. If they provide that if the city does not purchase it must renew, then they also provide that if it does not renew it must purchase. The duty imposed by the two alternatives is an equal one. Neither is the primary obligation. The time of per-

formance of both, and therefore of either, is the same. Whatever is done must be done "at the end of twenty years." Neither before nor after that time can the city act, and if it does not act then, it cannot act at all. If it can be said that the right or the duty to act is a continuous one, when does it cease? And how can this honorable court, or any other court, compel the city in an action for specific performance, or in any other action, to exercise its discretion as to which of these things it will do, or, failing to do anything, decree either a purchase or a renewal? The impracticability of this construction would seem to be conclusive that it is incorrect. The Court of Appeals escaped the dilemma only by saying that the two sections, neither of which creates an obligation upon the part of the city, taken together do make an obligation, and that two sections identical in language must be construed the one to create a duty and the other to reserve a right.

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g. The Construction of the Contract in the Light of Section 20.

The Court of Appeals refers to section 20 of the ordinance as being in harmony with the conclusion it has drawn as to the construction to be placed on sections 11 and 12. Section 20 provides that all the mains, pipes, etc., then owned or which might thereafter be laid by The Denver Water Company, its successors or assigns, "shall be and remain the sole and absolute property" of the company, which "shall forever be considered and entitled to be in possession thereof, except in case of purchase by said city under the terms of this ordinance or some agreement be-

tween said city and said company * * * when all rights of whatsoever nature of said company * * * in and to the subject matter hereof shall vest in said city." This section seems to us entirely out of harmony with the construction given by the court to sections 11 and 12. For if the city was required to buy if it did not renew, and bound itself irrevocably to do one or the other, section 20 was wholly superfluous, since there was then no necessity of providing that the company's pipes and equipment should remain its property. This would follow as a matter of course if the city renewed; it could not grant an extension of the company's franchise and at the same time claim its property. If the city purchased, the property of the company would become the property of the city by the act of purchase. But, on the other hand, adopting our construction of these provisions, should the city refuse, as it might, either to buy or to renew, the company would very naturally assume the necessity of such a covenant for the protection of its interests that none of its tangible property might be affected by the termination of its franchise. Thus it will be seen that section 20 performs a function, if the other two sections reserve options merely; but otherwise it is meaningless.

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h. "Contemporaneous Construction" of the Contract.

Counsel for both the trust company and the water company have devoted much time in their arguments heretofore made to what they term "contemporaneous construction," to show that the city understood that Ordinance 44 of 1890 means what either the water company or the trust company now con-

tends. The doctrine of contemporaneous construction, as applied to contracts between private parties, is necessarily different from its application in case of municipal franchises, if it is applicable in such case at all. For, to begin with, there is first to be considered the doctrine of the limited powers of a municipality, and, second, that of the refusal to imply anything against a city and the construction adopted in favor of the public in case of ambiguity. In case of private contracts the doctrine of contemporaneous construction is applicable to explain ambiguities, but in case of municipal franchises entirely different doctrines, which are above set forth, apply. Consequently we may well doubt whether contemporaneous construction may be applied to the case at bar. If a city has certain rights, its mere failure to insist upon them cannot deprive it of such rights except by way of laches or estoppel. One set of municipal officers might construe the contract in a certain way, but so long as no one was injured thereby this would not prevent the city from later adopting another construction more in accordance with the rules of construction of such contracts which have been laid down by the courts. But even if this doctrine is applicable, we do not believe the acts referred to by counsel support their contention.

The respondents and the Court of Appeals consider the ordinance of 1894 in regard to the South Denver waterworks system as decisive of the meaning of the parties in sections 11 and 12. That ordinance is set forth at pages 210-213 of the printed transcript of record. The Court of Appeals said:

"In 1894 the city annexed the town of South Denver and thereby become the owner of a water system belonging to that municipality. Finding it was operating it at a loss an ordinance was adopted by the city December 15th, 1894, and accepted by the Water Company, whereby the plant was leased to the company at an annual rental for the period ending April 10th, 1910, which was the date of the expiration of the principal contract or franchise of 1890. This ordinance required the Water Company to put in new construction for the better equipment and efficiency of the leased property, and provided that at the termination of the lease the city, if it elected to do so, might purchase the new construction at the appraised value thereof. But it was also provided, as in the principal ordinance, that the election to purchase should precede the appraisement. If the city concluded not to purchase the new construction, then the Water Company *was required to purchase what it had leased of the city, and in that event it was to receive a franchise upon the same terms as in the ordinance of 1890, the rates, restrictions and limitations to be as under the franchise as elsewhere in the city.* That ordinance is a complement of the one of 1890, to which it made express reference, and was designed to secure a uniform status for the entire city, either municipal ownership of the property of the Water Company or private ownership under an extended franchise. It shows quite

clearly what the parties meant by sections 11 and 12 of the older ordinance contract."
(187 Fed., 898.)

While the lease granted in the ordinance of 1894 expired on the same day as the water company's franchise, yet it is noticeable that the disposition of the property is not controlled by the action of the city under the ordinance of 1890. The city might purchase under the ordinance of 1890 the property of the water company, and by declining to purchase the new construction compel the water company to purchase the pipes and mains belonging to the city in South Denver. It may be said that this is an improbable contingency, but if the purpose of the ordinance had been what the Court of Appeals implies, without doubt such clear and unmistakable language would have been used as to leave no chance for such a contingency to arise.

Nor must it be overlooked that this ordinance of 1894 is not in any manner inconsistent with the construction of sections 11 and 12 of the ordinance of 1890 contended for by the city. If it be argued that the construction of the Court of Appeals is correct, because the ordinance of 1894 apparently adopts that construction, the contingency of the city's purchasing the main plant and leaving the South Denver plant to the water company being highly improbable, we reply that the same improbability would exist as to such a contingency arising under the construction of sections 11 and 12 contended for by the city, and its construction of sections 11 and 12 is entirely consistent with the ordinance of 1894. Doubtless, as the Court of Appeals says, it was the intention of the

city to acquire a municipal plant embracing the whole city, or else to grant a franchise to the company; but there is no presumption that the city in acquiring a municipal plant intended to purchase the company's system. The court assumes in its examination of the ordinance of 1894 that such was the case; but this is begging the whole question, and unless this presumption is made the court's argument falls to the ground.

But, further: If the ordinance of 1894 throws any light on the original ordinance of 1890, light equally brilliant is thrown by Ordinance 163 of 1907 (to which we have heretofore referred), accepted by the water company before the expiration of the franchise of 1890 or the lease granted in the ordinance of 1894. If the company and the city may be presumed to have contracted in 1894 with full knowledge of their respective rights, so must they be presumed to have contracted in 1907. By this latter ordinance the taxpayers of the city were to vote whether they should purchase or renew, or do neither, and due provision is made in case the voters "shall refuse to accept either the proposition as to the purchase of said property or as to the granting of a new contract" (Record, p. 76).

An examination of Ordinance 163 of 1907 cannot fail to convince anyone that its purpose was to make an agreement between the city and The Denver Union Water Company, so that the city might purchase the water company's plant or grant it a new franchise, or do neither. The ordinance was intended to create a new contract in place of Ordinance 44 of 1890. It was intended to include all of the property held by The Denver Union Water Company at that time,

whether owned or used by it. The preambles and the body of the ordinance show that, aside from the different property involved, the only material difference between this ordinance and that of 1890 is that by the latter the city may have the benefit of an appraisement before it decides whether it will buy or not. Incidentally, too, the appraisers were required to fix a table of rates to be the basis of the proposed new franchise to be voted upon. This is because the Supreme Court of Colorado a few months previously had declared the rate-determining provision of the old ordinance unenforceable. Ordinance 163 of 1907 clearly and unmistakably gives the city the right (1) to purchase, or (2) to make a new contract, or (3) to do neither; but there is not one word in the whole ordinance to show that in granting these rights it was intended to be in any way different from the provisions of Ordinance 44 of 1890 relating to purchase or renewal. Can it be that Ordinance 163 of 1907, purporting to make certain changes in the contract between the city and the company, modified it in a most important particular—i. e., the compulsory purchase or renewal—as is contended by the respondents, without referring in the most remote manner to such modification, while all other changes are expressly pointed out, or the reason for making them is clearly evident? Such a construction is at variance with the canons of construction applied by courts everywhere to municipal contracts and grants of franchises.

i. A Practical Objection to the Water Company's Construction: Impossibility of Performance.

When section 5 of Ordinance 44 of 1890 was declared unenforceable by the Supreme Court of Colorado, what was the result on the contract, if the entire ordinance is held to constitute one entire contract? When Ordinance 44 was adopted, the city council had the power

> "to provide a water supply * * * and generally to do whatever may be needful and necessary to be done in order to supply the city with water for fire, irrigation, domestic and other purposes and regulate the same" (Sess. Laws Colo. 1889, p. 128, sec. 9).

The rate-making power being, as this court has held, a governmental function, and not to be deemed waived by implication (Freeport Water Co. vs. Freeport, 180 U. S., 587), does not the whole contract, based as it necessarily was on this rate provision, become void? How, then, could a void contract be renewed? How could the contract, emasculated by the invalidation of section 5, be renewed without entirely depriving the city of its rate-making power *in invitum?* And how can a contract be renewed when one of the most important provisions, if not the most important provision, fails for uncertainty or because unenforceable? This one feature of Ordinance 44—the declaring unenforceable of the rate provision thereof—would absolutely prevent any renewal of the entire ordinance as a single contract, even if the city had agreed to renew it.

We contend, therefore, that the rights of the water company set forth in Ordinance 44 have ceased; that sections 11 and 12 reserve rights to the city only and create no obligation upon it; that this is shown by the plain language of the ordinance, by the rules of construction adopted by this court, by the intent of the parties, by contemporaneous construction, by subsequent acts of the parties, and by the impossibility of giving the ordinance a logical construction if the contention of the respondents herein as to sections 11 and 12 is adopted. We contend also that if Ordinance 44 is a single, integral contract, it is impossible to renew it on account of the decision of the Supreme Court of Colorado declaring the rate-making provision thereof unenforceable.

III.

THE ALLEGED IMPAIRMENT OF THE CONTRACT.

We believe we have demonstrated that no contract exists, or could legally exist, between the City and County of Denver and the water company whereby the city is obligated either to purchase the plant of the water company or to renew its franchise or contract. But even if the contract alleged did exist, there has been no impairment of its obligation.

In this case federal jurisdiction is invoked on the ground of diversity of citizenship, and the further ground that a federal question is involved, to-wit: the alleged impairment of the obligation of a contract. If our contention that the water company should be aligned with the trust company as complainant is sustained, there is no diversity of citizen-

ship, and jurisdiction must depend solely upon the constitutional question. We have heretofore contended that such question is frivolous, and therefore jurisdiction should be denied. Here we contend that, even though there is sufficient merit in the question to justify the federal court taking jurisdiction of the controversy, still there is no impairment of the obligation of any contract, and unless there is such impairment, no cause of action in the complainant for an injunction is stated. The allegations of the bill, if taken as true, may show a right in the water company to sue at law for $14,400,000, but in such case the federal court would not have jurisdiction.

The argument on the question of impairment, taking more advanced ground than that on the question of jurisdiction, must inevitably to some extent be a repetition of what has gone before. We shall endeavor, however, to confine ourselves in this part of the brief to a short argument and citation of authorities in support of our contention that, even though there are in the bill sufficient allegations regarding impairment to give the federal courts jurisdiction, yet such allegations are unsupported by the record and the law.

It will be remembered that we have found an uncertainty as to what constitutes the contract of the city, whose obligation is alleged to be impaired. But the contention is, speaking broadly, that the city has agreed to purchase or to renew, and that it has failed to do either. The Circuit Court of Appeals does not say that the two agreements are equally binding, but it says that the city is obligated to purchase if it does not renew, although it could not be bound to renew;

the trust company says that it has become obligated to purchase by agreement; while the water company contends that the city agreed to purchase, but by refusing to pay it became obligated to renew. The original and basic agreement on the part of the city is found in sections 11 and 12 of Ordinance 44, and this, taken together with certain acts or omissions which are alleged to amount to an election or a refusal to perform, is the contract whose obligation is supposed to be impaired.

The Circuit Court of Appeals said regarding the legal effect of these acts:

> "The trust company says the city elected to purchase and the water company says it elected to renew, but the facts are stated upon which these claims are based and it does not appear to us that the city has done either." (187 Fed., 903.)

That conclusion seems irresistible. If the city is obligated to purchase the water company's plant, it can only be because it has refused to renew, and that under sections 11 and 12 of Ordinance 44 of 1890 the purchase becomes imperative. And if the city is obligated to renew, the same is true, *mutatis mutandis*.

What are the acts relied upon as constituting the impairment? The water company has no exclusive franchise; and the city has not agreed not to erect a competing plant. Hence the Vicksburg and Walla Walla cases are not authority on the question of impairment. If there is an impairment, it cannot be found in any legislation of the city authorizing the construction of a municipal plant, so far as that legis-

lation merely authorizes such construction. If the impairment is found in section 264a, it must be in some other part of it. And yet the decree in this case that is appealed from, and which is based upon what the complainant insists is the principal relief prayed for in the bill—to-wit, the injunction—restrains the city from erecting a municipal plant.

The bill, to which we must look for the allegations of impairment, avers that Ordinance 163 of 1907 is an impairment of the contract contained in Ordinance 44 of 1890 (Record, p. 16), unless it is an agreement to purchase, and that section 264a of the charter is an impairment (Record, p. 22) of the same contract.

In the bill Ordinance 163 of 1907 is also alleged to be part of the contract (Record, p. 13), or, if not, then section 264a is (Record, p. 21). Ordinance 163 is expressly alleged to be an election to purchase in paragraph 11 of the bill (Record, p. 15), and it is said that to give it the construction urged by the city is to impair the obligation of the contract contained in Ordinance 44 of 1890 (Record, p. 16).

Now, as to Ordinance 163 we contend that under it the city was to vote whether it would purchase or not, or make a new contract or not, not binding itself to do either. Words can be no plainer than those used in Ordinance 163 to express this meaning, and we will not take the time of this court by making any argument on this point. Nor can we hope to persuade this court that section 264a is not an election, if the mere reading of it has not been found conclusive on this point.

Ordinance 163 of 1907 was passed by the city *and accepted by the water company.* How can this new

contract impair the obligation of the old? Does the fact that the trust company contends that the new contract does not mean what it says, make the adoption of the correct meaning an impairment? If the company enters into a new contract with the city, even though it may have misunderstood the meaning of that contract, it cannot say the proper meaning impairs any obligation; for the company itself acquiesced in and agreed to the act.

We cannot see how Ordinance 163 of 1907 can impair the obligation of the contract of the city with the water company, and counsel have done little to enlighten us.

We shall now pass to a consideration of the next alleged act of impairment, being section 264a of the city charter.

It is alleged in the bill that charter amendment section 264a impairs the obligation of the contract set forth in Ordinance 44 and in subsequent acts of the city whereby the city became obligated to purchase the water company's plant at the appraised valuation (Record, p. 22). Does this allegation rely upon the contract in section 11 of Ordinance 44 of 1890, or upon the contract created by the subsequent acts? What these later acts are is not clearly shown, although in one place it is alleged that Ordinance 163 of 1907 is one of them (Record, p. 13), and, if not, that section 264a is (Record, p. 21). It would seem to be the theory of the bill that Ordinance 44 obligated the city to purchase, and that Ordinance 163 obligated it to purchase at the appraised valuation made under it, or, if not, that section 264a did.

But, in the latter case, how can the same section impair the obligation of a contract which it itself

creates? And if section 264a impairs the obligation of a contract theretofore made, whether by Ordinance 44 alone or by it in conjunction with Ordinance 163, then, as we have shown before (the trust company's construction of 163 depending upon its construction of 44), we are driven back to the earlier ordinance. We will try to discover how the provisions of charter amendment 264a impair its obligation.

The construction of sections 11 and 12 adopted by the Court of Appeals is that the city was thereby obligated to purchase the water company's plant, if it did not renew its franchise. Another construction, being that contended for in the cross-bill (Record, p. 121), is that the city agreed either to purchase or to renew at the end of twenty years, and the contention in the bill probably is that by section 11 and subsequent acts the city agreed absolutely to purchase. We shall try, in examining the question of impairment, to consider the effect of section 264a on all of these suggested constructions of Ordinance 44.

Section 264a of the city charter (Record, pp. 79 et. seq.), provides:

1. That "nothing in the preceding sections or in this charter except as herein specifically provided, shall apply to the acquisition or operation of a water works for supplying the City and County of Denver and its inhabitants for all uses and purposes."

2. "But a public utilities commission is hereby created to consist of three members to have complete charge and control thereof and to have and exercise all the powers given to the board of public works as to all public utilities."

3. The term of office and salary of the commissioners is then stated, and the names of the members

for the first term. Provision is made for future elections and bonds of members.

4. The commission is given certain general powers; among them: "said commission shall have and exercise all the powers of the City and County * * * in the matter of constructing, purchasing, * * * acquiring, * * * and operating a water plant or system for all uses and purposes and everything pertaining or deemed necessary or incidental thereto."

5. "Except as in this section provided the City and County shall never purchase or acquire or exercise any option, right, privilege or power of purchasing or acquiring any water plant or system from any person, persons or corporation, except upon a vote of the qualified electors first had and obtained authorizing the same, and—"

6. "Wherever in any ordinance or contract the former City of Denver was given the right or the City and County now has the privilege or power to purchase or acquire any water system or plant, or to extend any contract with reference thereto, the term 'city' used in any such ordinance or contract shall be taken and held to mean the qualified electors of the City and County and not otherwise."

7. "Upon a vote of the taxpaying electors authorizing the same, as hereinafter provided, the City and County of Denver shall and it does hereby authorize the creation of an indebtedness" of $8,000,000 in bonds to provide a municipal plant "for supplying the city and its inhabitants with water for all uses and purposes."

8. "If The Denver Union Water Company shall place in escrow with the Continental Trust Company

of Denver on or before July 1, 1910," a deed conveying all its property embraced in the appraisement made under Ordinance 163 of 1907, with direction to deliver the same to the commission in exchange for $7,000,000 par value of bonds, "then the commission shall file its acceptance with said Trust Company and the same shall constitute a binding contract of purchase." In that event a special election shall be called and the question submitted of issuing the $8,000,000 in bonds, of which $7,000,000 shall be delivered to the trust company and $1,000,000 retained for betterments. "In case The Denver Union Water Company shall fail or refuse to comply with all the foregoing provisions," then there shall be submitted at the election the question of issuing $8,000,000 bonds to construct "a complete system of water works for supplying the City and County and the inhabitants thereof with water for all uses and purposes."

9. "Any provision of the charter in conflict herewith is repealed."

All of this charter amendment that has any bearing on this controversy is here set forth. The Circuit Court of Appeals in its opinion said:

> "* * * by fair construction Section 264-a seeks to free the city from both the alternatives, from all obligation to the water company."

On the contrary, we believe that it is a most unfair construction of the section to say that it seeks to free the city from any obligation whatever.

Let us examine the above analysis. The first provision is to the effect that nothing in the charter, "ex-

cept as herein provided," shall apply to the acquisition of a water system, and the ninth provision repeals all parts of the charter in conflict therewith. No rights claimed in the bill for the water company are based upon or derived from the charter. Nor can the provisions creating a public utilities commission and fixing their terms of office, etc., impair the obligation of any contract. The fourth provision, vesting the commission with all the powers of the city and county in the matter of constructing, purchasing, acquiring and operating a water plant, is proper; for if the city has any powers, it must empower some of its officers to execute them, and there is no reason why the public utilities commission should not have the power granted to it. Other cities have granted such powers to their public utilities commissions, and this mere grant of power, unless it impairs the rights of someone, cannot be complained of. It is implied, but not expressly stated, by counsel that, as the powers were previously in the hands of the council, to divest that body of them and vest a new body with them impairs the obligation of the city's contract. They do not, however, show that they have any vested interest in the council which is impaired thereby.

The fifth provision—to the effect that, "except as in this section provided," the city shall never exercise any option or power of purchasing a water system "except upon a vote of the qualified electors first had and obtained authorizing the same"—is objected to by counsel for the water company as

> "a manifest attempt by legislative act of the city, through its electors, to amend and

change the terms of a prior existing contract in a most important particular and in a manner exceedingly detrimental to the water company. Clearly this impairs the obligation of the prior contract."

It is contended there is an impairment because the foregoing provision, and the one immediately succeeding—to the effect that wherever in any ordinance or contract the city was given the right or power to purchase any water system, or to extend any contract with reference thereto, the term "city" shall be taken to mean the qualified electors thereof —change the body which represents the city in making such contract from the council to the whole electorate.

We confess we cannot see the force of this argument. Even though the city had already agreed to purchase or extend, these provisions could not in any wise impair the obligation of such a contract. The act operates prospectively only.

City R. Co. vs. Citizens St. Ry. Co., 166 U. S., 557.

Shotwell vs. Moore, 129 U. S., 590.

And if the city had agreed to purchase (*and it must be borne in mind that the bill is based upon allegations of a binding obligation or election to purchase*), the city was already bound thereby, the obligation was complete, the indebtedness was incurred, and no act of the city, even an absolute refusal to pay, could impair such obligation. If the city had agreed to renew the contract, the fifth provision has no application. But the sixth provision provides that

the power to extend shall thereafter be vested in the qualified electors.

This question of renewal, not being set up in the bill, is not material, therefore, in considering the relief prayed for therein and the grounds relied upon. But the cross-bill filed by the water company alleges that it was entitled to a renewal (Record, p. 123). If the renewal resulted automatically by the refusal of the city to purchase on April 10, 1910, then the adoption of charter amendment 264a on May 17, 1910, could not affect the manner of renewal. Even if, as the water company contends, the renewal resulted automatically, but the city was required under section 11 of Ordinance 44 to pass an ordinance to evidence the renewal, such ordinance would not come within the purview of the above provision of section 264a, which applies only to the right, privilege or power to extend a contract and not to the method of evidencing the same. And, on the other hand, if the renewal was not automatic, then it was not obligatory, but discretionary, and the construction of sections 11 and 12 making them alternative obligatory agreements on the part of the city falls to the ground. If section 12 of Ordinance 44 only reserved an option, the substitution of the voters of the city as the proper persons to exercise that option in place of the council does not impair the obligation of any contract.

Oshkosh Waterworks Co. vs. Oshkosh, 187 U. S., 437.

Owensboro vs. Owensboro Water Works Co., 191 U. S., 358.

The seventh provision, authorizing the incurring of an indebtedness of $8,000,000 for a municipal

plant, cannot alone be objected to, and it and that part of the eighth provision which authorizes the construction of a new plant in case the water company refuses to sell can only be an impairment if the city had power to grant and had granted an exclusive contract to the water company, or had agreed not to compete with it, which it did not do. Hence the contemplated erection of a municipal plant cannot impair the obligation of the water company's franchise.

As has been said by this court:

> "There is no implied contract in an ordinary grant of a franchise such as this that the grantor will never do any act by which the value of the franchise may in the future be reduced. Such a contract would be altogether too far reaching and important in its possible consequences in the way of limitation of the powers of a municipality, even in matters not immediately connected with water, to be left to implication."
>
> Skaneateles Water Works Co. vs. Skaneateles, 184 U. S., 354, 363.

And:

> "It may be that the stockholders of the plaintiff supposed, at the time it became incorporated, and when they made their original investment, that the city would never do what evidently is contemplated by the ordinance of 1889. And it may be that the erection and maintenance of gas works by the city at the public expense, and in competition with the plaintiff, will ultimately im-

pair, if not destroy, the value of the plaintiff's works for the purposes for which they were established. But such considerations can not control the determination of the legal rights of the parties."

Hamilton Gas Light Co. vs. Hamilton, 146 U. S., 258, 268.

"One who asserts private rights in public property under grants of the character of those under consideration, must, if he would establish them, come prepared to show that they have been conferred in plain terms, for nothing passes by the grant except it be clearly stated or necessarily implied. * * * It is enough to deny the privileges contended for if, upon considering the act, the mind rests in doubt and uncertainty as to whether they are intended to be conferred."

Blair vs. Chicago, 201 U. S., 400, 463, 467.

Counsel for the water company argue:

"We submit that there is fair ground for the contention that the contract relations between the city and the water company were of such a character as to prohibit the city during the continuance of the contract from taking its water supply from any source other than the works of the cross-complainant, which would necessarily involve a prohibition against the erection by the city of competing works, and making such works

> the exclusive source of the city's water supply;"

but this same argument has been made in so many cases in this court, and rejected by it, that we do not consider it necessary to reply to it at any length, and we only quote from one decision:

> "We think this ordinance shows an agreement upon the part of the company to furnish water to the inhabitants of the city at not exceeding certain maximum rates, and to the city itself, upon terms to be agreed upon, made definite, as far as the city was concerned, for the term of five years. As thus interpreted, we do not find anything in this contract that prevents the city, certainly after the expiration of five years, from constructing its own plant. It has not specifically bound itself not so to do, and, as has been frequently held in this court, nothing is to be taken against the public by implication. Hamilton Gas Light & Coke Co. v. Hamilton, 146 U. S. 258; Long Island Water Suppy Company v. Brooklyn, supra, and cases cited in the opinion. Had it been intended to exclude the city from exercising the privilege of establishing its own plant, such purpose could have been expressed by apt words, as was the case in Walla Walla City v. Walla Walla Water Company, 172 U. S. 1. It is doubtless true that the erection of such a plant by the city will render the property of the water company less val-

> uable and, perhaps, unprofitable, but if it was intended to prevent such competition, a right to do so should not have been left to argument or implication, but made certain by the terms of the contract."
>
> Helena Water Works Co. vs. Helena, 195 U. S., 383-392.

It is contended by the trust company that the proposition to submit the question of incurring $8,000,000 bonded indebtedness for the erection of a municipal plant to the voters impairs the obligation of the city to submit the question of purchase at the appraised valuation to the voters, as the water company had the right to insist upon the submission under the conditions then existing, and that if the voters first authorized the indebtedness for erecting a municipal plant, they would afterwards certainly reject the proposition to buy what would be a superfluous plant.

There was no obligation to submit the question of purchasing the water company's plant at the appraised valuation. That appraisement was made under Ordinance 163 of 1907, which provided for the submission at the same election of two questions: (1) of purchase of the water company's plant at the appraised valuation, and (2) of a new twenty-year contract at rates to be fixed by the same appraisers (Record, p. 72). The appraisers did not and reported they could not fix the rates (Record, p. 256), and no further steps were taken under Ordinance 163, either by the water company or the city. The city had no power to submit one question alone, and the contract

to be voted upon was to be prepared by the water company (Record, pp. 71, 72), which it did not, and under the circumstances could not, do on account of the failure of the appraisers to act. The Circuit Court of Appeals recognized that there was no obligation to submit the one question, and such a submission would unquestionably have been void.

But, furthermore, such a contention is not permissible under the allegations of the bill. That pleading can only be sustained on the theory that the water company had some absolute right, some contract the obligation of which the city had impaired. The provisions of Ordinance 163 of 1907 are material in this controversy only as that ordinance adopted and carried out the provisions of Ordinance 44 of 1890, and the complainant had a cause of action only if that earlier ordinance imposed an obligation upon the city. If prior to and under Ordinance 163 of 1907 the city had not agreed to purchase, and if the question of whether the city should purchase was to be voted upon at the election to be held under Ordinance 163, then the bill must fall, as it is based upon an impairment of a supposed obligation already incurred.

But the objection made by the trust company is without merit. If it were good in law, the city could incur no further indebtedness after making the contract, for every dollar of increased indebtedness would impair the obligation of the contract and make the possibility of a favorable vote less. And if the city had the right to erect a municipal plant, it might vote upon the question and authorize it, even though

by so doing it might decrease the value of the water company's plant.

Skaneateles Water Works Co. v. Skaneateles, 184 U. S., 354, 363.

Hamilton Gas Light Co. v. Hamilton, 146 U. S., 258, 268.

The water company has taken the view that

> "the manifest attempt of Section 264a is to substitute an obligation contingent upon a vote of the taxpayers for an obligation theretofore by the terms of the contract absolute. It clearly constitutes an impairment of the obligation."

But the analysis heretofore made demonstrates, we believe, that there is no attempt at such substitution. If the obligation was absolute before the adoption of 264a, it remained absolute thereafter, and nothing therein contained impaired or even modified that obligation, and if the obligation was not absolute then this action must fail.

But assuming that the Court of Appeals is correct when it says,

> "by fair construction section 264a seeks to free the city from both alternatives, from all obligation to the water company" (Record, p. 347),

yet we have seen that whatever it may seek to do, it does not free the city. Section 264a has not attempted to put it out of the power of the city to perform its obligation to the water company, and while it may

"*seek* to free the city * * * from all obligation," this mere seeking is not an impairment. If the water company has an exclusive franchise as against the city, then section 264a might be an impairment. But, in the absence of that exclusive feature, section 264a can at the most only be a refusal to perform. If the city is obligated to buy the water company's plant, that company can compel it to pay the price, even though it has adopted a dozen charter amendments like section 264a. And so if the city is obligated to renew the franchise.

That a city may own two waterworks systems cannot be denied, if it may own one. As the Supreme Court of Ohio has said:

> "That a municipal corporation may own two plants, one acquired by purchase and the other erected by it, or after having acquired one in the former mode may proceed to erect a new plant is not questioned."
>
> Elyria Gas & Water Co. vs. Elyria, 57 Oh. St., 374.

The right is as unquestioned as the right of a city to own a municipal plant after having granted a franchise (neither exclusive nor non-competitive) to a private company, such as has been sustained by this court in numerous cases; *vide:*

> Knoxville Water Co. vs. Knoxville, 200 U. S., 22;
>
> Water, Light & Gas Co. vs. Hutchinson, 207 U. S., 385;

and by the Supreme Court of Colorado as to cities in this state in:

Donahue vs. Morgan, 24 Colo., 389.

But the Court of Appeals says:

> "It is no answer to say that the city may buy one complete system of waterworks and also build another, or may renew a contract entailing the annual payment of a large sum for hydrant service and also build a system of its own 'for all uses and purposes.' It is impossible to believe such an unnecessary waste was intended or was what the electors voted for when they adopted the charter amendment." (Record, p. 347.)

We submit the intent of the voters who adopted section 264a, except as it is gathered from the language thereof, is immaterial and does not establish the legal relations between the parties. The duty of the court is to give a statute a construction that will enable it to uphold its constitutionality, rather than a construction which would make it void:

Wellmaker vs. Terrell (Ga. App.), 60 S. E., 464;

In re Burnette, 73 Kan., 609;

State vs. Union, 62 N. J. L., 142;

and to say whether the effect of section 264a as adopted impairs the obligation of the contract. Does it impair the obligation of the contract to buy? Does it impair the obligation of the contract to renew? Does it impair the obligation of the contract to buy or renew? There can only be one answer. If the city was

obligated before the adoption of section 264a to do any of these things, it is still obligated, and section 264a can at the most be construed as a refusal to perform, and as such it constitutes no impairment.

Dawson vs. Columbia Trust Co., 197 U. S., 178.

Newburyport Water Co. vs. Newburyport, 193 U. S., 561.

Knoxville Water Co. vs. Knoxville, 189 U. S., 434.

St. Paul Gas Light Co. vs. St. Paul, 181 U. S., 142.

But, furthermore, if the city was obligated either to purchase or to renew, it was obligated to do so prior to the expiration of the contract evidenced by Ordinance 44 of 1890—April 10, 1910. As it had not performed by that date, *it follows that on the 11th day of April, A. D. 1910, the city's breach of its contract was complete, or else by failing to renew it had automatically elected to purchase.* In either event the city's breach occurred and the company's right of action accrued on that day. *No subsequent legislation can alter this fact.*

On May 17, 1910, thirty-seven days afterwards, the people enacted section 264a of the charter, which the Court of Appeals declared to be an impairment of the contract, and therefore a violation of the constitution of the United States. That is to say, a contract alleged to have been theretofore repudiated, thereby investing the injured party with the right of instant appeal to the courts, has been impaired by a charter amendment enacted some time thereafter. If this is a correct exposition of the law, it follows that a con-

tract can be impaired by legislation enacted at any time after breach thereof, without regard to the right of the injured party to invoke the aid of the courts for his protection.

The liability of the city, if any, was absolute when it refused to perform. No subsequent act could thereafter impair the obligation of the contract thus broken. It might attempt to escape liability, but that was fixed in the one or the other direction on the 11th day of April, A. D. 1910.

This court, in Dawson vs. Columbia Trust Company, 197 U. S., 178-181, said:

> "The bill presents a naked case of breach of contract. The first step of the City was to repudiate the contract and refuse to pay. *Whatever it may have done subsequently,* its wrong, if there was a wrong, was complete then." (Italics ours.)

Suppose section 264a had not been adopted, but the council had by ordinance enacted that it would neither buy nor renew, or that it would construct a plant of its own, or that it attempted to grant a franchise to someone else, or the city had contented itself by answer denying the obligation of the contract, or had done nothing at all—must there not, in the judgment of this court, have been just as much of an impairment of the contract obligation as that accomplished by amendment of the charter more than a month after the agreement was broken?

Now, while section 264a did provide the exact procedure to be followed by the city and county in acquiring a municipal plant, the municipality did not

derive its power to do so from that amendment. Article XX of the constitution of Colorado, which created the City and County of Denver, and which was adopted in 1902, gave it "the power * * * to construct, condemn and purchase, purchase, acquire, lease, add to, maintain, conduct and operate water works." (See Appendix.) This again was antedated as to the former city of Denver by the old charter, of which section 20 of Article II, as amended by the General Assembly of Colorado and published in Session Laws of 1889, pages 124, 128 (approved March 11, 1889), is in part as follows:

> "The City Council * * * shall have power by ordinance: * * * 57. To construct or purchase water works for the use of the city."

This act was effective over a year prior to the enactment of Ordinance No. 44 of 1890, and hence the right of the city to erect its own waterworks existed when Ordinance 44 was passed. The steps taken by the city and county to acquire a municipal plant cannot therefore impair the obligation of the alleged contract of 1890, as this court has clearly stated many times that if the act of a municipality which is claimed to impair the obligation of a contract is done pursuant to statutory authority given prior to the execution of the contract, there is no impairment.

> Shawnee Sew. & Dr. Co. vs. Stearns, 220 U. S., 462.

We have now examined the effect of section 264a on the contract contained in Ordinance 44 of 1890. It is alleged in the bill that the same charter amend-

ment impairs the obligation of the city's contract to purchase which was completed by the adoption of Ordinance 163 of 1907. But as this alleged contract is the same in effect as the alleged contract to purchase in Ordinance 44, it is unnecessary to go further into this question.

If, therefore, Ordinance 163 of 1907 cannot impair the obligation of any contract, and if charter amendment 264a does not impair the obligation of the contract contained in sections 11 and 12 of Ordinance 44 of 1890 and subsequent acts, or the contract contained in Ordinance 163—and we believe we have demonstrated that it does not—then there is no impairment; and if there is no impairment, there is no cause of action stated in the bill which the present complainant can maintain.

The bill attempts to charge an impairment of the obligation to purchase the water company's plant, and this is the only federal question attempted to be stated. But wherein lies the impairment, even if we admit, for the argument's sake, that the contract to purchase exists?

If the water company has no exclusive or non-competitive contract (and the bill does not allege such contract, and the complainant disclaims any contention that such contract exists), there must be found some peculiar feature in the contract that makes its obligation liable to impairment. Mere impairment of the value of a contract is not impairment of its obligation:

Curtis vs. Whitney, 13 Wall., 68, 70;

and a mere refusal of a city to perform a contract is not an impairment:

> Dawson vs. Columbia Trust Co., 197 U. S., 178, 182.

Hence the mere fact that the city has refused to pay the purchase price for the plant which the bill alleges it has agreed to buy is no impairment:

> St. Paul Gas Light Co. vs. St. Paul, 181 U. S., 142, 149;

and the construction or the attempt to construct a municipal plant when the city has not agreed not to do so is no impairment:

> Skaneateles Water Co. vs. Skaneateles, 184 U. S., 354.
>
> Helena W. W. Co. vs. Helena, 195 U. S., 383.
>
> Light, Gas & Power Co. vs. Hutchinson, 207 U. S., 385.

The complainant seeks to escape this dilemma in two ways: one in its bill, and the other in its printed argument heretofore filed in the Court of Appeals.

The bill states in the fourteenth paragraph the only matters on which an impairment of the obligation of the contract can be based. It alleges that the city is authorized by the state to contract with a private corporation or individual for a supply of water, or by construction, purchase or lease to acquire a municipal plant; that the city "is not authorized by any provision of the Constitution, statute or charter relative thereto, but on the contrary is without authority" to obtain by purchase a complete system already constructed and at the same time to construct another

system; that, inasmuch as it has already entered into a binding contract to purchase the existing plant of the water company, section 264a, so far as it purports to require the submission to a vote of the question of issuing bonds to construct a complete new system of waterworks, is wholly beyond the powers, express or implied, of the city (Record, p. 20).

That is as much as to say that, although the water company has no exclusive franchise, yet, as the city has already contracted to purchase its plant, and has no power to both purchase and construct, its attempt to construct is an impairment of its obligation to purchase.

That such an attempt would be an impairment we strenuously deny; but there is another objection to these allegations. By making them the trust company has stated itself out of the federal court. If section 264a is not adopted pursuant to authority of the state, there can be no "impairment," in the sense in which that term is used in the federal constitution, for such "impairment" must be the act of or authorized by the state.

> Hamilton Gas Light Co. vs. Hamilton, 146 U. S., 258.
>
> Barney vs. City of New York, 193 U. S., 430.

Thus in the strenuous attempt of the complainant to state a federal question it has defeated its own purpose. In trying to make a case which would be within the principle enunciated in the exclusive or non-competitive franchise cases, it has merely stated a case over which the federal courts have no jurisdiction at all. Even if there be impairment stated,

the impairment is that of the city and not of the state, and such impairment is not within the purview of the inhibition of the federal constitution.

But, furthermore, as it is alleged that the city has already elected to purchase, even if the city has no power to obtain by purchase a water plant already constructed and at the same time to construct a municipal plant, all that is stated is a lack of power in the city to construct its own plant, and its attempt to do so, being unauthorized, is void for want of power and can in no wise interfere with its obligation to purchase.

Hamilton Gas Light Co. vs. Hamilton, *supra.*

Barney vs. City of New York, *supra.*

McCain vs. Des Moines, 174 U. S., 168.

The other theory on which the alleged impairment is based is found in the brief filed by the trust company in the Court of Appeals, though it is not alleged in terms in the bill. Counsel there argued at length the proposition that by Ordinance 44 of 1890 the city granted a franchise to the company for twenty years, and provided for the purchase of the plant at the expiration of that time in case it did not renew the franchise. They then contended that while the city could not be compelled to renew the franchise (owing to the charter provision restricting the grant of a franchise to a period of twenty years), yet, as the granting of such extension was merely a means of avoiding the city's obligation to purchase, and as the city had failed to grant a new franchise, "*the agreement to purchase, operating automatically on April 10, 1910,* constituted an election by the city

to purchase the plant * * * which contract * * * has been impaired by Charter Amendment 264a" (Brief, pp. 147, 148). It is then contended that, as section 264a authorizes an election for the purpose of considering the issuance of $8,000,000 bonds to construct a municipal plant, no portion of which can be used for the payment of the purchase price of the water company's plant, "it is as certain as any human event can be that the electors of the city would never authorize an additional bond issue for the purpose of paying such purchase price" (*ibid.*, pp. 207, 208); that section 264a "and the acts taken in pursuance thereof as fully insure the defeat of any proposition to issue bonds in order to carry out the prior contract with the water company as though the amendment absolutely prohibited the submission of any such question to an electoral vote. And can it be doubted that such a prohibition would impair the obligation of the previous contract?" (*Ibid.*, p. 208.)

The alleged impairment is that, because the city was obligated to purchase the water company's plant, the provision in section 264a for an election to issue bonds for a municipal plant insures the defeat of a proposition to issue bonds to pay the purchase price of the water company's plant, and hence constitutes an impairment.

But where is the necessity of holding an election to issue bonds? And where is the necessity for issuing bonds? There is no limitation on the indebtedness that may be incurred by the city and county for the purpose of acquiring a supply of water, and no limitation upon the rate of taxation that may be imposed for that purpose. If the city has elected to purchase the water company's plant, there is no neces-

sity of holding an election to authorize bonds to pay for it. No state or city law requires that bonds shall be issued to pay for waterworks; cities are permitted to do so, however, if they so desire. Section 264a merely provides that "the city shall never purchase or acquire, or exercise any option to purchase, any water plant, except upon a vote of the qualified electors first had and obtained."

But the bill is based upon the theory that the city had already purchased; if the question of purchasing is still to be submitted to the electors, there is no impairment, and if it is the city's duty to submit that question, the remedy is by mandamus *and not in the federal court*. Counsel seek to avoid this dilemma by *assuming* that it is necessary to hold an election to authorize the issuance of bonds to pay the purchase price, and that the defeat of this election is insured by the election provided for in section 264a, and hence that section impairs the obligation of the contract. The premises are incorrect and the conclusion erroneous. If the city has elected to purchase, it is obliged to pay the price whether bonds are issued or not. Furthermore, while the purchase of waterworks is made dependent upon a vote of the electors by section 264a, the issuance of bonds in payment thereof is not made obligatory. The issuance of bonds may be convenient for the city, but they are not necessary for the water company, and it cannot complain if bonds are not issued. It cannot be compelled to accept bonds; it must be paid in cash, and if the city desires to issue bonds to obtain the necessary cash from the sale thereof, that is something with which the water company and the trust company have nothing to do. The water company can

compel the city to pay the purchase price in the event it does not do so, if it has contracted to buy. But the fact that an election for bonds may be or will be defeated does not impair the obligation of the contract and does not affect it at all.

It is true that paragraph 16 of the bill contains allegations that section 264a impairs the obligations of the contract (Record, pp. 22, 23), but these allegations are based upon one of two clearly erroneous assumptions: either (1) that the refusal to pay for the water company's plant impairs the obligation of the city's alleged contract to purchase it, or (2) that the city has no right to construct a municipal plant, after it has agreed to purchase the water company's plant. It is too well established by the decisions of this court to require argument, that a refusal to pay is not an impairment, and if the city has contracted to purchase the water company's plant, nothing it can do in the way of constructing a municipal plant can impair the obligation of the contract. The purchase is complete, and the water company's, to say nothing of the trust company's, interest in the plant has terminated.

IV.

DUE PROCESS OF LAW.

It is also alleged in the sixteenth paragraph of the bill that the city is attempting to deprive the company of its property without due process of law, because under section 264a the city has offered the water company $7,000,000 for property worth at least $14,400,000, proposing, if the company refuses to sell, to con-

struct a municipal plant (Record, p. 22). If, however, the city is obligated to pay the $14,400,000, or to purchase the property at any price, neither a refusal to pay nor the construction of a municipal plant can deprive the company of its property without due process of law. The basis of the allegation is the contention that the city has already purchased the property, but, of course, if it has not done so, it may offer any price it wishes for the water company's plant. The water company is not compelled to accept the price offered. And as there is no exclusive or non-competitive contract, the city may erect a municipal plant without depriving the company of its property without due process of law.

Knoxville Water Co. vs. Knoxville, 200 U. S., 22.

And as it may construct a municipal plant without offering a company supplying water anything for its plant, it may, *a fortiori*, offer it $7,000,000 therefor. As a matter of fact, this offer was perfectly gratuitous. There was no obligation on the city to offer the water company anything for its property. How, then, can it be said that the offer deprives the company of its property?

The only way in which this contention can be given any semblance of force is by going back to the allegations in the fourteenth paragraph of the bill, where it is alleged that the city has no authority to erect a municipal plant, when it has already contracted to purchase a complete system, and hence that its action in using the threat that it will erect such plant in order to compel the water company to sell

its system at less than its true value is not due process of law (Record, p. 20).

Instead of taking the water company's property without due process of law, section 264a expressly provides that it shall not be so taken.

> Seattle Electric Co. vs. Seattle, 185 Fed., 355, 370, 371.

The case is identical in principle with Newburyport Water Co. vs. Newburyport, 193 U. S., 561, wherein this court held that there was no attempt to deprive the water company of its property without due process of law, in an act passed by the legislature giving the company the privilege to sell to the city, if it chose to do so, coupled with the right conferred upon the city, if the company did not sell, to erect a water plant of its own. As this court said:

> "The contentions therefore as to the Constitution of the United States are based solely upon the proposition that because the legislature sought to protect the company and save its property from ruin by conferring upon it the privilege of selling its property to the city, if it chose to do so, thereby compulsion and consequent violation of the Constitution of the United States arose. In other words, that because there was conferred a benefit upon the corporation which the legislature need not have bestowed and which the company availed of that its property was taken from it forcibly and without its consent. When the contention is thus reduced to its ultimate analysis it comes to this—that the property of the company was taken

from it without its consent because by the action of the legislature for the benefit of the company it was enabled to sell its plant to the city and thus escape a serious loss, etc."

See also:

Skaneateles Water Co. vs. Skaneateles, 184 U. S., 354, 367.

Hamilton Gas Light Co. vs. Hamilton, 146 U. S., 258, 268, 269.

Bienville Water Co. vs. Mobile, 186 U. S., 212, 219.

Lehigh Water Co. vs. Easton, 121 U. S., 388, 390, 391.

It may be that the attempt by a city to act under a void law is not acting under due process of law, but it is not the deprivation of property without due process of law.

McCain vs. Des Moines, 174 U. S., 168.

And even if the law is void because unauthorized, the complainant in this case has no right to attack it on that ground.

Meridian vs. Farmers Loan & Trust Co., 143 Fed., 67.

V.

NO RIGHT IN THE NEW YORK TRUST COMPANY TO MAINTAIN THE SUIT.

The New York Trust Company by its bill seeks the specific enforcement of a contract which it alleges exists between the city and the water company for the purchase of the latter's plant. If it be assumed, for the purpose of the argument here, that the suit is primarily one for specific performance, and that the injunction sought is merely ancillary, then—even if it be conceded that the alleged contract exists—there are several reasons why the trust company may not maintain the suit as one for specific performance, and why its bill of complaint should be dismissed.

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1. The Trust Company Not a Party to the Contract.

In the first place, the trust company is not a party to the alleged contract, and ordinarily one not a party to a contract—a stranger to it—may not sue for its enforcement. The contract in question is between the city and the water company, and both of these parties deny its existence, and the water company claims to be unwilling to bring any proceeding for its enforcement.

The rights of the trust company in this contract are based wholly upon the mortgage or deed of trust made by the water company. Its relation to the latter company is that of trustee under this mortgage. Assuming that the mortgage covers the rights of the water company under Ordinance 44 and the alleged

contract to purchase between the water company and the city based upon that ordinance, it must be kept in mind that the trust company is only a mortgagee or conditional assignee of this contract. Subject to the mortgage, the contract, if any, is the property of the water company. The trust company has no claim to such property except under and by virtue of the terms and conditions of the mortgage. The record discloses no default by the mortgagor, the water company; no breach of any of the terms of the mortgage; no act or omission on the part of the water company giving rise to any right in the trust company to enforce the alleged contract. There is no allegation in the bill upon which can be predicated any right of foreclosure of the mortgage—much less any right of enforcement of any contract between third parties, both of whom deny its existence.

We have been able to find no authority whatever for the maintenance of the bill for specific performance of the character of the one here in question by a party complainant standing in the position of the trust company, and we believe there is none.

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2. *The Trust Company May Not Sue in the Federal Court as an Assignee of a Chose in Action.*

In the next place, it is a well-settled rule that a suit for the specific performance of a contract is one to recover the contents of a chose in action, and cannot be maintained by an assignee in the federal court,

where the assignor could not have maintained it in that court.

Corbin vs. County of Black Hawk, 105 U. S., 659, 665.

Shoecraft vs. Bloxham, 124 U. S., 730, 735.

Here clearly the trust company, complainant in a suit for the specific enforcement of a contract, stands in the relation of an assignee or conditional assignee to the water company, and if the latter, a citizen of Colorado, may not maintain the suit in the federal court, its assignee, the trust company, may not.

The trust company contends, however, that its right to maintain the bill also arises from the covenants of the mortgage assigning to the trustee therein "all the rentals, debts, dues, demands, and choses in action of every kind and nature, including water rents * * * in and by virtue of any contract or contracts, resolution or resolutions, ordinance or ordinances," etc. (Record, pp. 52, 53), and that in the trust deed it is provided that "in case the City of Denver shall have a right to purchase the works and property of the first party (the defendant water company) *situated within its corporate limits on the tenth day of April 1910* [italics ours], and in case of such purchase" all moneys to be paid by the city shall be paid directly to the trustee (Record, p. 61).

But the assignment of the rentals, debts, demands, choses in action, etc., by the mortgage, merely incumbers them as a part of the security for the bondholders. They are paid to, and owned by, the defendant water company, which is not in any respect in default as mortgagor, and any attempt to collect them or require their payment directly to the trustee

by bill filed against the water company, under the circumstances appearing in this case, would be successfully defended by the latter.

Here, the trustee does not pretend to sue for the rents and profits under the contract, nor does it allege any failure of the city and its inhabitants to pay them to the company. Its contention is that, because it is the assignee thereof under the mortgage, it has the right to compel the specific performance of a contract affecting such rents and profits between its mortgagor and the city, and to make the company a party defendant to the bill. This claim is wholly untenable.

Moreover, even if the trust company be deemed an absolute assignee, as distinguished from a mortgagee or conditional assignee, of the various rentals, debts, demands, etc., mentioned in the trust deed, it may not maintain this bill on behalf of the bondholders in a federal court, because its assignor, the water company, a citizen of the state of Colorado, could not itself maintain such bill.

New York Guaranty Co. vs. Memphis Water Co., 107 U. S., 205.

Eau Claire vs. Payson, 107 Fed., 552 (rehearing denied, 109 Fed., 676).

American Water Works etc. Co. vs. Home Water Co., 115 Fed., 171, 176.

3. The Bill Cannot Be Maintained Because It Is Too Broad.

But assuming, *arguendo*, that the trust company may maintain a suit for the specific performance of the alleged contract, the bill filed by it is too broad and must be dismissed.

It seeks relief in respect to property not covered by the contract upon which its suit is founded. Ordinance 44 constitutes the foundation of the trust company's cause of action. In its brief in the Circuit Court of Appeals (p. 3) the trust company refers to this ordinance as constituting "the foundation of this appellee's cause of action." The bill is framed, and seeks relief, upon the theory that the contract to be specifically performed covers all the property of the water company now used by that company in supplying the city and its inhabitants with water, including not only the property within the corporate limits of the former City of Denver covered by Ordinance 44, but all the property in the outlying municipalities and suburbs, subsequently, with the City of Denver, merged into the City and County of Denver, and also property of competing and subsidiary companies, such as The Citizens' Water Company and the South Platte Company (Record, p. 29).

The allegations of the bill, and particularly in the fifth paragraph thereof (Record, p. 4), show that the property of nine different corporations is included in the property of the present Denver Union Water Company. The affidavit of William P. Robinson (Record, pp. 180 et seq.) shows that the plant of The Citizens' Water Company, an entirely independent corporation, which had been operating in South Den-

ver, Colfax, Valverde, Globeville, and Barnum (all of which were independent municipalities, but which have since become parts of the City and County of Denver), together with the properties of The Beaver Brook Water Company and The Mountain Water Company, which had been operating in Berkeley, Highlands, and Barnum (which municipalities have also since become parts of the City and County of Denver), had subsequent to 1890 become merged with the property of The Denver Water Company, and that they are now all included in the property of the defendant, The Denver Union Water Company. This property, together with that of The South Platte Company, comprises that which the complainant trust company is now seeking to compel the city to purchase.

By reference to the recitals of the pleadings in the case of The Denver Water Company, appellant, vs. The Citizens' Water Company, appellee, on pages 274 et seq. of the Record, it will be seen that in 1890, when Ordinance 44 was passed, The Citizens' Water Company was a corporation supplying water in the City of Denver, in active competition with The Denver Water Company. Its distributing plant in large part practically duplicated that of The Denver Water Company in the City of Denver.

The property, therefore, which is the subject of this suit includes not only the original property of The Denver Water Company, which it held in 1890, and legitimate extensions and improvements thereof, but also the property of entirely different corporations (that were engaged in 1890 in supplying water to municipalities which at that time there was no intention of merging with the City of Denver into

the City and County of Denver), and also the competitive plant of The Citizens' Water Company.

We contend that even if the City of Denver agreed to purchase the plant of The Denver Water Company in twenty years from the date of Ordinance 44, it did not also agree to purchase everything that any competitive water company which might operate in the City and County of Denver might own or use. Surely it was not in the contemplation of the parties in 1890 that the city should be required to take all this property; and unless such was their intention, evidenced by their contract, the bill of the trust company cannot be sustained, for it seeks specific enforcement of a contract alleged to embrace all this property, and is framed on the theory that such contract covers the same.

Section 11 of Ordinance 44 provides that "at the expiration of the period of twenty years * * * in case the city shall then elect so to do, the *said works* may be purchased by the said city * * * " (italics ours.) (Record, p. 36.)

What are these "said works"? Examining the ordinance carefully, it will be found that this can refer only to the "water pipes, valves, hydrants, and apparatus" which the water company is granted the right to lay and maintain in certain streets and public places in the City of Denver, the streets being specified. It is true that in section 2 the city agrees thereafter, to such extent as it may lawfully do, to grant further rights to the water company; but this section can have no operative force, because the charter of the City of Denver (Sess. Laws Colo. 1889, p. 130, sec. 24 *supra*) then in force provided that all franchises or privileges thereafter granted

by the City of Denver to corporations or individuals should be limited to twenty years, and should plainly specify on what particular streets, alleys, or avenues the same should apply, and that no franchises or privileges should thereafter be granted by the City of Denver in general terms or to apply to the city generally.

In 1894 The Denver Union Water Company, after acquiring the property of all the water companies, competitive or otherwise, which were then supplying water to the inhabitants and municipalities which became later the City and County of Denver, executed a mortgage on all of its property, which is the same mortgage under which the New York Trust Company is trustee. As indicating the construction placed by the parties to this mortgage upon Ordinance 44, with reference to the extent of the property covered thereby, attention is called to section 20 of that mortgage, which appears on page 61 of the Record, and which is as follows :

> "In case the city of Denver shall have a right to purchase the works and property of the first party [defendant water company] *situated within its corporate limits* on the tenth day of April, 1910, and in case of such purchase, if the first party shall be obliged to deliver the property of the first party so purchased to the said city of Denver, free and clear of all incumbrances; and it shall be necessary to pay off and redeem the whole of the indebtedness secured by this instrument, it is agreed that all the moneys to be received by the said first party from

> the said city of Denver on account of said purchase shall be payable to the said second party directly from the city, and the same are hereby assigned to the said second party for the purposes of the trusts by this instrument created." (italics ours.)

Here is a distinct recognition by the parties to this trust deed—namely the water company and the predecessor of the trust company—that the construction above contended for is correct; to-wit, that the property which the city reserved a right to purchase by virtue of section 11 of Ordinance 44 of 1890 was only certain of the property of the company lying within the corporate limits of the city of Denver, as it then existed; and yet the prayer of the bill is that defendant city be required to take over all of the property of The Denver Union Water Company, whether it be that included within the purview of Ordinance 44 or not, and also the property of The South Platte Canal & Reservoir Company, all of which lies outside of Denver, and which is so extensive and so valuable that a bonded indebtedness of four million dollars exists against it (Record, pp. 8, 9).

Surely the New York Trust Company as a party can be interested only in the property covered by its mortgage. It has no rights concerning property outside its four corners.

Further "contemporaneous construction" of Ordinance 44, with reference to the extent of the property covered thereby, is found in the provisions of Ordinance 163 (Record, pp. 69 et seq.). The bill is framed on the theory that the property which the city is required under Ordinance 44 to purchase is that

described in, and appraised under, Ordinance 163 (Record, pp. 11, 12); but the latter ordinance, instead of merely referring to Ordinance 44 for a description of the property, contains a most specific and particular description of the property, as follows:

> "The property, business and rights so owned or used by The Denver Union Water Company, party of the second part, its allied and auxiliary corporations and associations and persons connected with it aforesaid, by which said company at the present time supplies water to the said City and County of Denver, party of the first part, and its inhabitants, or to any one else at any place whatever, for domestic, manufacturing, or irrigating purposes, and which shall constitute and include all the property, rights, and privileges of every kind and nature whatsoever acquired by said party of the second part from its predecessor The Denver Water Company or from any person or corporation whatsoever, whether the legal title be held by said The Denver Union Water Company or by some other person; and also all property, real or personal, easements, rights, and privileges, and contracts of every and all nature and kind whatsoever acquired by said party of the second part, its allied and auxiliary corporations or associations, or persons connected with it since their respective incorporations, which are in any way connected with or related to said water plant of said The Denver Union Water Com-

> pany or held by its allied or auxiliary corporations or associations or persons connected with it or necessary or useful for its protection, maintenance and operation." (Record, p. 162.)

There is a wide difference between the property covered by Ordinance 44 and that covered by Ordinance 163, and the parties to Ordinance 163 and the contract made thereunder recognized the fact by the terms and provisions embodied in that ordinance and contract setting forth with care and particularity the property covered thereby.

But the question of the extent of the property covered by Ordinance 44 has been conclusively adjudicated in an action between the City of Denver (predecessor of the City and County of Denver) and The Denver Union Water Company. The case is reported in 41 Colorado, page 77. When the City of Denver sought to enforce against The Denver Union Water Company the provision of section 5 of Ordinance 44, that at any time after five years from the date of the ordinance the city might require the water company to fix schedule rates for private consumers equivalent to the average rate prevailing in the cities of Chicago, St. Louis, and Cincinnati, for the same service, the water company made the contention:

> "That the rates provided to be fixed in and by section 5 of the contract of April 10, 1890 (Ordinance 44), are not by the terms of the said contract, and cannot be, by plaintiff, made to apply to towns which have been, since the making of said contract of April 10, 1890, annexed to the city of Denver by a

vote of the inhabitants thereof, and that the respective rights of the defendant company, and of the inhabitants of the territory embraced in said independent towns which have been annexed, remain as though there had been no annexation thereof, and are to be controlled only by the contracts existing between the said defendant company and said independent towns or cities, and that the plaintiff has only the rights in the premises as against the said defendant that were had or might be asserted by the said independent towns and municipalities against the defendant company, had there been no annexation, and that the rights and obligations, respectively, of the plaintiff and defendant, are the same as the rights and obligations of the said defendant, and the said towns and municipalities were prior to the said annexation, and that this finding applies, respectively, to the inhabitants or territory embraced within the former towns and cities of Highlands, Colfax, Barnum, South Denver, and Harman, being the only towns and cities concerning which, and the annexation of which to the city of Denver, any evidence has been introduced in this cause, and that the same rule is applicable to all other towns that may hereafter be annexed to said city in the same manner as the towns herein enumerated."

City of Denver vs. Denver Union Water Co., 41 Colo., 77, 92.

And the court in its opinion said:

"The amended complaint further alleged that the obligations of the defendant company, under the ordinance, applied to the additions of Colfax, Highlands, South Denver and Barnum, and that the company was bound, under the terms of the ordinance, to furnish water to private consumers in the above towns under the requirements of the ordinance.

Section 1 of the ordinance granted the water company the right and privilege of laying its mains in the streets, avenues, alleys and public places of the city of Denver 'and additions thereto.'

In answer to this the defendant denied that the obligations of the contract applied or related to the additions, Colfax, Highlands, South Denver and Barnum, and alleged that those additions, or cities, at the time of their annexation to the city of Denver, and the private consumers thereof, were supplied with water under separate and independent contracts, and not under the contract of April 10, 1890; that the annexation or addition of the said cities or towns to the city of Denver could not abrogate the contracts or change or alter the same in any respect or particular whatever.

The evidence in the record abundantly supports the defense pleaded by the defend-

ant company, and for this reason finding 10 hereinbefore set forth is sustained."

41 Colo., 106.

This question is therefore conclusively settled. If the company was not bound by the terms of the contract in respect to the important matter of rates as to those parts of its system which lay outside the limits of the City of Denver, as they were established in 1890 when Ordinance 44 was enacted, can that company now claim rights as to those parts in other respects? Is it equitable, after the company has defeated the city in its contention that all the parts now included in the system are subject to the rate-making provision in section 5 of Ordinance 44, to permit that same company to come into court and say: "No, these parts are not subject to the provisions of section 5, but they are included in section 11"? This would be whipsawing the city with a vengeance.

Inasmuch as the bill seeks to obtain relief affecting property beyond the scope and extent of that covered by Ordinance 44, the contract upon which the bill is based, no relief whatever can be granted—not even relief restricted to the property covered by Ordinance 44. In such case the court does not grant *divisional* relief.

In People's Gas Light & Coke Co. vs. Chicago, 194 U. S., 1, a suit to enjoin the city of Chicago from enforcing an ordinance reducing the price of gas, the contract which was claimed to be impaired granted an exemption or immunity from such reduction; it was made, however, only with one of several corporations merged into the complainant, and affected only the

property and franchises originally belonging to it. It was held that divisional relief could not be granted affecting only the property of such constituent company, when the bill was not framed in that aspect, but prayed for a suspension of the impairing ordinance as to *all* of complainant's property.

The court said (pp. 15, 16, 17):

> "Assuming, but without intimating any opinion to that effect, that by the amended charter of 1865, the state contracted with the People's Gas Light & Coke Company that the city should not thereafter be empowered to reduce the price of gas below three dollars per thousand feet, the preliminary inquiry is whether by the consolidation that contract was extended to the plants of, and territory occupied by the companies absorbed. The Circuit Court held that it was not so extended, and that as the bill sought relief in respect of the entire plants and territory, the entire system as consolidated, it could not be maintained because there was no such contract which the ordinance impaired or destroyed * * *, In short, agreeing with the Circuit Court, we are of opinion that the asserted immunity (conceding it *arguendo*), did not extend to so much of the system as passed to the consolidated company from companies not possessing such immunity in their own right; that under this bill relief could not be accorded in respect of part of the system."

Applying the rule announced in the above case to the case at bar, neither the relief sought, nor relief as to any part of the property in question, can be granted upon this bill.

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4. The Trustee of The South Platte Company Should Be a Party to the Bill.

The bill discloses that the defendant South Platte Canal & Reservoir Company is the owner of the Cheesman dam and reservoir and other property, which is repeatedly alleged in the bill to constitute an integral and essential part of the waterworks system operated and used by the defendant water company in supplying the City and County of Denver and its inhabitants with water (Record, pp. 8, 9, 10, 11, 12). The South Platte Company on July 1, 1903, executed a mortgage or deed of trust of all its property, rights and privileges, to secure an issue of bonds of four million dollars (Record, p. 9). The record does not disclose the name or citizenship of the trustee in this mortgage. This trustee holds the legal title to a very considerable and essential portion of the waterworks system in question.

There is no necessity for a citation of authorities to the proposition that such trustee is an indispensable party to a suit for the specific performance of a contract, covering, as alleged by the bill, a large amount of property to which it holds the legal title.

The fact that the water company owns the stock of the South Platte company and controls that company, if it be a fact, is immaterial in this connection. The water company does not control the trustee under

the mortgage of the South Platte company, and has no means, so far as the record shows, of disposing of, or exercising any control over, the legal title to the South Platte property which that trustee holds.

The presence of the trustee of the South Platte company as a party in this litigation is quite as essential to a determination of the controversy as is that of the complainant trust company. The bill avers (Record, p. 9) that on July 1, 1903, the South Platte company executed to "a trustee" its deed of trust upon all its property, etc. It cannot be assumed that "a trustee" means the complainant. On the contrary, it must mean that such trustee is an outsider, and thus far a stranger to the action. If such trustee is a citizen of Colorado, it would as co-complainant deprive the federal court of jurisdiction, on the ground of diversity of citizenship. If, as is the fact, it is a trust company organized under the laws of New York and should be aligned with the two defendant companies, its presence as such party is equally fatal to the court's jurisdiction upon that ground. This trustee must be made a party to the action if complainant's bill is to be sustained.

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5. Non-Performance of the Alleged Contract on the Part of the Water Company Bars a Suit for Specific Performance.

The record discloses that the water company failed to perform its agreements with the city during the life of Ordinance 44. If we regard that ordinance as an entirety, that being the water company's position, it is well to determine whether the company has

performed its covenants; for, if not, its prayer for relief must be denied. "He who seeks equity must do equity;" which, here applied, means that he who asks for specific performance must show performance upon his own part.

The case of City of Denver vs. The Denver Union Water Company, 41 Colo., 77, discloses a bitter controversy between the parties thereto over the attempted enforcement of section 5 of Ordinance 44. The length of the opinion indicates the importance of the controversy, which is applicable here, in that section 5 was declared to be invalid because impossible of observance. That was the contention of the company then, and it was sustained. In the face of the record in that case, which concludes both the city and the company, the latter now has the audacity to ask this court to decree a renewal of the contract, involving an impossible, and therefore an invalid, condition, and decreed at its own instance to be so. Until counsel present an authority from a reputable court anywhere which even indirectly sustains so preposterous and inequitable a contention and demand, we shall not feel bound to treat the proposition seriously.

But section 13 of the ordinance, equally binding upon the company, requires the latter at all times, whenever so ordered to do by ordinance duly passed, to extend its mains upon any street upon which no main shall then be laid, and set fire hydrants thereon, for each of which the city must pay the company the price per hydrant thereinbefore mentioned.

It will be recalled that both the complainant and the water company allege more than once a performance by the latter of all the requirements and condi-

tions of the ordinance. But the affidavit of E. B. Thrush (Record, p. 261), and the certificate of Burt F. Davis, clerk of the City and County of Denver (Record, p. 262), show the passage by the city council of fifty-nine ordinances enacted at various times during the twenty-year period from the year 1902 to and including the year 1909, requiring the setting of 158 hydrants and the making of eighty-five separate extensions of mains by the company, which ordinances were wholly disregarded. This indisputably convicts the company, not of an occasional, but of a continued and chronic, violation of its contract. It is presumable that these extensions were demanded by the needs of a growing population, not only for purposes of fire protection, but for domestic supply. This company, so insistent upon compelling due respect to obligations alleged to exist in its behalf, has cheerfully ignored its corresponding obligations for a period of eight years prior to the institution of this suit. The truth of the averments of performance is quite in keeping with the far-reaching character of its demands for relief against the city. The latter would long ago have been justified in repudiating Ordinance 44, because of the misconduct of the water company thereunder, as shown by the record. If the company, to shield itself from this condition, invokes the provisions of section 21 of the ordinance in its behalf, it must then inform the court what contract it is the renewal of which is demanded. The court cannot do this for it. It will be impaled by either horn of the dilemma, and we are not concerned as to the choice, the making of which it cannot avoid.

The trust company cannot, of course, maintain its bill if it appears that the water company, from which

it derives its interest in the alleged contract and under which it claims, has failed in the performance thereof on its part. The bill should be dismissed upon this ground.

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6. The Conduct of the Water Company between the Time of the Appraisement under Ordinance 163 and the Commencement of this Suit Estops It to Assert a Right to a Renewal.

The water company also is estopped by its conduct between the time of the appraisement under Ordinance 163 and the commencement of this suit to assert any right under Ordinance 44. This contract expired on the 10th day of April, 1910. The city exercised neither of its options, and proceeded to do the things which prompted the filing of this bill. Both the city and the company regarded Ordinance 163 as displacing sections 11 and 12 of Ordinance 44, rightfully assuming an end of all relations between them under these and the other terms of that ordinance after April 10. The water company prior to April 10, 1910, prepared a bill for a franchise, and presented it to the city council under the provisions of the charter. That body placed it upon its passage and passed it, as required by the charter. The water company deposited the estimated cost of submitting it to public vote for approval, and the same was thereupon submitted in due form to the qualified taxpaying electors at the general election of May 17, 1910, at which charter amendment section 264a was adopted. This proposed franchise and agreement is in the record (Record, pp. 268, 269). Its title is as

illuminating as its terms are extraordinary. It differs in practically every important particular from the franchise embodied in Ordinance 44, and the differences are, as a matter of course, in favor of the company; but a discussion of them is not at present necessary. On March 31, 1910, ten days before the expiration of Ordinance 44, the company issued an address to the citizens and taxpayers of Denver (Record, pp. 282, 283). This was circulated throughout the city and mailed to all the voters. It consists of comparisons between the "old franchise" and the "proposed new franchise," to the evident advantage of the latter. The recitals of the circular are binding upon the company. These are all in line with the present contention of the city.

In this circular the company says:

> "During the past twenty years, under that franchise [meaning Ordinance No. 44] the constant litigation and turmoil caused by its *impossible provisions* has not been beneficial either to the Company or the City. The present franchise is drawn *to eliminate every ambiguous and indefinite provision.*" (italics ours.)

Thus it appears that the company declared the provisions of the old franchise to be ambiguous, indefinite and impossible, before the city did so. The fourth page of the circular lauds the specific nature of the rates contained in the proposed franchise, and the people are assured that all ambiguities have been omitted—such as the average of three cities, etc.—contained in Ordinance No. 44, which caused contin-

uous litigation and enormous expenditures in such litigation both by the city and the company. On page 8 of the circular the electors were informed that—

> "*The old franchise* does not in any manner, shape or form provide any penalty for failure to comply with its provisions. The nearest approach to such a provision is in Section 18, which authorizes an arbitration commission to which disputes regarding the rights of the City and Company were to be referred, but the commission was not given any power to enforce its rulings. *Hence the provision was worthless.*" (italics ours.)

Again:

> "*There is no attempt under this section to provide for an exclusive franchise, as this is forbidden by the charter of the City and County of Denver.*" (italics ours.)

And again:

> "It is hoped that if this franchise is granted, all possibility of continuous strife and litigation between the Company and the City will be eliminated."

The last page is like the preceding ones, only more so:

> "Not a word is found in *the old franchise* that in any manner recognizes the existence of any law or any authority higher than the franchise itself. Sections 2 and 12

> of the old franchise do not make any definite statement as to time of expiration. On the contrary, Section 12 specifically provides for successive extensions of the grant. Section 2 provides for the grant of additional rights in the streets of the City upon application of the Company at any time, subject to the renewal conditions of Section 12." (italics ours.) (Record, pp. 282-3.)

It is hardly necessary to add that the requirements of section 2 and section 12 of Ordinance No. 44 are here transposed. The important feature of this circular, however, is its reference to the old as distinguished from the new franchise, and its assumption of the expiration of the former as contended for by the city and county.

The proposed franchise was emphatically rejected at an election held thirty-seven days after April 10, 1910 (affidavit of Matthew F. Murray; Record, pp. 268, 269). No whisper from company quarters announced any intention of reliance upon Ordinance No. 44. Let us suppose that, pending this proposed franchise, the city on April 10, 1910, had voted to renew the same, and that on May 17 the people had voted to grant the franchise asked for—which of the franchises would the company have insisted upon operating under? The answer is obvious.

Not until the Public Utilities Commission had taken every step required by section 264a, and the bond election of September 6, 1910, was at hand, was any assertion of the right of renewal, or of the existence of the contract of purchase, made. Both were then put forward, the latter by the water company in

the name of the trust company, the former by the water company *in propria persona*. But the latter made its own record. It cannot avoid the same, either directly or through its New York agent.

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7. *No Equity in the Bill.*

We have already shown that the bill, while drawn in the form of a pleading in equity, and while praying specific performance, states merely an action against the city for $14,400,000 money due. The case of N. Y. Guaranty Co. vs. Memphis Water Co., 107 U. S., 205, was one where certain bondholders filed a bill in equity to recover moneys alleged to be due on a contract which the city had made with the mortgagor, and which was assigned in the mortgage as part of the security for the bonds. The bill was dismissed on one ground, that the demand against the city was cognizable at law in the name of the mortgagor. The case is similar in principle to the case at bar, and certainly a refusal of the mortgagor to bring such action would not justify a suit in equity against the city by the mortgagee.

There are cases—although we have failed to find one in this court, and the above decision is to the contrary—that the vendor may bring a suit for specific performance to recover the purchase price. These cases are probably decided on the theory that specific performance must be available to both parties. But these cases are not precedents for the instant controversy, and the rule followed in them would deny the complainant's right to the relief prayed for in this bill. The New York Trust Company is not the vendor,

and if the city sought to specifically enforce the alleged contract, it could not do so against the New York Trust Company. Therefore the trust company should not be permitted to enforce it against the city.

VI.

THE CROSS-BILL.

The Denver Union Water Company, one of the defendants named in the bill, has filed a cross-bill, asking relief against the City and County of Denver and its officers (Record, pp. 111 et seq.). The relief prayed for is an injunction restraining the city from proceeding to construct a municipal plant under the provisions of section 264a of its charter, that the water company be decreed to be entitled to a renewal of its contract, and that section 264a be declared unconstitutional. One basis of the relief prayed for is the alleged contract contained in sections 11 and 12 of Ordinance 44 of 1890 and the alleged impairment thereof by the city by the adoption of section 264a of its charter, being the same grounds relied upon in the bill, although the cross-complainant alleges that the city is obligated to renew, while the complainant alleges its obligation is to purchase. In addition, the water company asks for other relief—that section 264a be declared unconstitutional—which is based upon a state of facts entirely different from those relied upon by the complainant, which are the contract rights of the water company. In so far as the allegations and prayer of the cross-bill are based upon the same state of facts as the bill sets forth, even

though the construction of the contract may differ, we have already discussed them, and here we shall only discuss certain conclusions drawn therefrom by the water company only. But the new facts, the new conditions, the new position taken by the water company, the new relief prayed and the company's right to it, are, we believe, not proper to be presented in this case at all. We shall endeavor to present our reasons for this contention.

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1. Rights Claimed by Water Company Based Upon Same Facts as Those Set Forth in the Bill.

Counsel say in their brief in the Court of Appeals:

> "It would seem to be perfectly clear that when a water company holds a contract with a city which obligates the city for the period of 20 years to obtain its municipal water supply from the works of said company a subsequent enactment obligating the city to obtain its water supply elsewhere, and for that purpose authorizing it to erect its own water works, to be the exclusive source of supply, impairs the obligation of the contract."

This argument is doubtless based upon the theory that the water company has automatically obtained a renewal of its franchise granted in Ordinance 44 of 1890 by reason of the city's failure to purchase the water company's plant. The water company contends that the charter limitation of twenty years on

franchises did not apply to its franchise, but we doubt if its argument on that point will commend itself to this court. That argument is that the charter limitation does not apply to its contract to supply water to the city and its inhabitants, or to its grant of street rights, although the charter provided that—

> "all franchises or privileges hereafter granted by the City of Denver to corporations or individuals shall be limited to twenty years from the granting of the same * * * ." (Sess. Laws 1889, p. 129.)

It is contended by the water company that the twenty-year limitation on grants of franchises and privileges in the charter does not apply to it, as its contract to supply the city with water at an annual hydrant rental is not a franchise, and its right to lay and maintain its pipes in the streets of Denver is not a franchise, but an "easement," and in any event was a vested right prior to the enactment of the twenty-year limitation.

It may be true that the contract with the city for hydrant supply is not a franchise. Whether the street right is a "franchise or privilege" within the meaning of the charter limitation is another question; we believe that it is, but that question is not necessary for determination in this case. *The right to do business in the city, the right to supply the city and its inhabitants with water,* as distinguished from the contract made with the city for the municipal supply at

a certain rental per hydrant, and from the contracts made with each individual consumer, *is a franchise.*

> New Orleans Gas Co. vs. Louisiana Light Co., 115 U. S., 650.
>
> New Orleans Water Works vs. Rivers, 115 U. S., 674.

And this is unquestionably limited by the charter to a period of twenty years. When this franchise has expired, the company can no longer do business in or with the city, although the city is not attacking its right to do so. But to argue, as the company does, that its street rights are perpetual and carry with them the right to operate, and consequently that its "contract" with the city for the municipal supply, not being expressly limited in Ordinance 44 to a definite period, must also be perpetual, is to argue that the company still possesses, and will continue to possess in perpetuity, a right which under the charter of Denver terminated April 10, 1910. The water company can make this argument only because it deliberately refuses to consider what its "franchise" is. From its argument that the twenty-year limitation does not apply to it one might think that it does not claim to have had a franchise; for if it had a "franchise or privilege," the limitation unquestionably did apply.

If the extension of twenty years has taken place automatically, then counsel say that to construct a municipal plant which is to be the exclusive source of supply is to impair the obligation of the contract between the city and the water company.

The water company does not come out boldly and claim an exclusive or non-competitive franchise, but it does argue in its brief in the Court of Appeals:

> "We submit that there is fair ground for the contention that the contract relations between the city and the water company were of such a character as to prohibit the city during the continuance of the contract from taking its water supply from any other source other than the works of the cross-complainant which would necessarily involve a prohibition against the erection by the city of competing works and making such works the exclusive source of the city's water supply."

We deny that there is fair ground for such a contention as the water company makes, and we base our denial on the numerous decisions in this court where practically the same argument was made. It is stated in the above quotation that the municipal plant is to be "the exclusive source of the city's water supply." But there is nothing in section 264a to show that the municipal works authorized therein are to be the exclusive source of the city's water supply.

What would be the effect if counsel's contention is adopted? If sections 11 and 12 mean that the company is entitled to a renewal if the city does not purchase, it must mean that these renewals must take place every twenty years. *The city has but one opportunity to purchase, on April 10, 1910,* and if it does not take advantage thereof it must renew forever; there is no other alternative to renewal after the first chance to purchase has been permitted to escape. This is the water company's own contention, and if their premise is correct—that, if the city does not purchase,

the company is entitled to a renewal—this construction of section 12 would seem to be proper. The result would be that the water company's franchise is perpetual.

It is also argued by counsel that the water company is entitled to have its renewal made by ordinance. They claim the renewal takes place automatically under sections 11 and 12, but that section 12 provides the renewal shall be by ordinance; that section 264a prevents such renewal being made by ordinance, and hence that it impairs the obligation of the contract. As a matter of fact, as we have heretofore shown, section 264a does not prevent an ordinance being passed if the renewal is already made; if it is not made, then the renewal was not automatic and is still discretionary with the city, in which case no court can compel it to exercise its discretion.

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2. *Rights Claimed by Water Company Not Based upon Alleged Infringements of Its Contract or Franchise.*

Counsel for the water company argue that they have certain rights to relief entirely independent of those based upon the contract alleged to be impaired by section 264a, on which the complainant relies. We deny that they have any such rights, or that they are proper subjects for adjudication in this controversy.

The cross-bill also alleges that section 264a is void because it is not a proper amendment to the charter; that it was improperly submitted to the voters and not legally adopted (Record, p. 130); and that, as it contains the sole authority under which

the city could issue bonds for the construction of a municipal plant,

> "everything authorized thereby, and which the city proposes to do under such authority, is unauthorized, illegal, wrongful in the eye of the law, and preventable by injunction." (Water company's brief in Court of Appeals, p. 174.)

The water company contends that it is entitled to this injunction even though it has not any contractual relations with the city. In other words,

> "even though we should assume, for the purposes of argument, that the water company has no contract with the city, relating to the water supply for municipal and private purposes; and even though we should assume that the water company has no street rights of definite duration, still it would be entitled to the protective relief which it seeks." (*Ibid.*, p. 172.)

It bases this contention upon the ground that it is the owner of a valuable water system and is engaged in a lawful business, that its plant is practically the sole means and source of supply of the city and all of the inhabitants. It says that—

> "it may be and doubtless is true that the water company could not complain legally of a loss or injury resulting from the doing by the city or by any one else of a lawful act in a lawful manner; but when an irre-

> parable injury is about to be inflicted by an act or a series of acts which, for any reason, are unlawful, then an actionable wrong is threatened, which equity will prevent by injunction." (*Ibid.*, p. 173.)

We have taken these excerpts from the brief of the learned counsel for the water company in order that their position may be thoroughly understood. It is that, having a water plant in the City of Denver, although their franchise has expired, they can ask in this action that the city be enjoined from constructing a municipal plant, because the act under which the city is attempting to do so was irregularly drawn or adopted, and therefore void.

Such a proposition, we believe, cannot be sustained. At the foundation of any right of action must be found the "right" of the complainant which has been injured by the "delict" of the defendant. And yet here the water company seeks to restrain the city's acts while admitting that it has no "legal right" itself which has been attacked. It says:

> "There can be no doubt of the immense injury which the water company will suffer if the city, instead of purchasing the present plant at a fair valuation, or in lieu thereof, renewing the contract for service, shall execute an independent competing municipal plant." (*Ibid.*, p. 173.)

No doubt there would be injury to the company's property, but that alone does not give the company a right of action. There is no express or implied con-

tract that the city will not erect a competing plant, nor even that it will never do any act by which the value of the franchise may be reduced.

Skaneateles Water Works Co. vs. Skaneateles, 184 U. S., 354.

It cannot be denied that the city has the right to provide itself with a municipal plant, provided it adopts the proper proceeding. But counsel say that, as it did not adopt such a method of procedure, the company may enjoin its action. Why? Because of the immense injury the company will suffer thereby? As well might one who has voluntarily constructed a waterworks plant make such an objection if the city attempted to erect a municipal plant. In one case the company never had a franchise, and in the other case it has a dead franchise. In the Skaneateles and Helena cases in this court the water companies, after their contracts or franchises had expired, attempted to do exactly what The Denver Union Water Company is trying to do in this case, but in both cases relief was denied them. But counsel contend this case is different because the city is trying to proceed under a charter amendment which is void because improperly drawn and improperly adopted. But so long as no legal rights of the water company are affected thereby it cannot ask that the city be enjoined from proceeding under the amendment, even though it be void. The rule is well settled that a law will be held unconstitutional only at the suit of a party directly affected thereby.

Clark vs. Kansas City, 176 U. S., 114, 118.
Supervisors vs. Stanley, 105 U. S., 305.

Red River Bank vs. Craig, 181 U. S., 548.

Tyler vs. Court of Registration, 179 U. S., 405, 406, 407.

Chadwick vs. Kelley, 187 U. S., 540, 546, 547.

Lampasas vs. Bell, 180 U. S., 276, 283.

Cooley, Cons. Lim. (6th Ed.), 196.

It is only on the assumption that its legal rights are affected by section 264a that the water company can attack its validity. It alleges that it is void under the constitution of the state and the charter of the city, and consequently that its enforcement may be enjoined in this action by one who has no legal rights. It does not allege that the fact that section 264a is not a true charter amendment, but a new and complete charter; or the fact that it contains provisions of constitutional law, of municipal law and of business matters; or that each provision or sentence thereof was not voted on and adopted separately; or that the commissioners for the first term were named therein; or that it was in conflict with certain provisions of the constitution relative to granting franchises; or that it is in conflict with other provisions of the charter relative to acquiring public utilities, attacks or injures its *legal rights*. These are all questions arising under the constitution and laws of Colorado alone. It does, it is true, allege that section 264a denies it the equal protection of the laws, deprives it of its property without due process of law, and that it destroys the republican form of government in Colorado; and these questions we shall discuss later. First we shall discuss the different mat-

ters which it is alleged make section 264a void, other than those arising under the federal constitution, and on which matters it is also alleged the water company may base its attack, even though it has no rights injured thereby.

First, as we have already seen, one whose rights are not affected thereby cannot assail the constitutionality of an act.

Second, an injunction will not be issued against the enforcement of a city law resting upon state authority, unless further circumstances are shown which bring the case within some clear ground of equity jurisdiction.

Boise Artesian Water Co. vs. Boise City,
213 U. S., 276, 285.

Third, these matters, if justiciable between the city and the water company, are only properly so in the courts of Colorado, under the laws of which state the water company is incorporated; and the validity of the section has been already adjudicated as to all the matters and things set forth in the cross-bill in three cases in the state courts of Colorado, entitled Vickery, Auditor of Denver, vs. Fellows; Vickery, Auditor of Denver, vs. Odoni; and Greenlee, Treasurer of Denver, vs. The Clark-Quick Printing Company, tried at *nisi prius* in the District Court of the City and County of Denver, to review which decrees writs of errors were sued out from the Supreme Court of Colorado and the cases docketed in that court numbered 7702, 7703 and 7704, which writs of error were afterwards dismissed. It is true that the water company was not a party of record to these suits, but its counsel strenuously attacked the charter

amendment, appearing as *amici curiae* in the lower court and the Supreme Court, and filed a printed brief of sixty-seven pages in the latter court (as against forty-four pages filed by the nominal plaintiff in error). This brief of the *amici curiae* commences:

> "This brief and argument is presented by counsel who represented and represent The Denver Union Water Company, defendant and cross-complainant in the New York Trust Company case, now pending in the United States District Court for the District of Colorado. The occasion for its presentation arises from the fact that many of the defenses made by the treasurer and auditor to these mandamus proceedings consist of precisely the same contentions advanced by The Denver Union Water Company in the federal court, in its attack upon the validity of Section 264-a."

There are allegations contained in the cross-bill that the water company is a taxpayer in Denver, and that, if the city proceeds under section 264a to construct a municipal plant, it, as a taxpayer, will be called upon to pay its *pro rata* share of the expense (Record, p. 142). It may be contended that the objections to the validity of section 264a referred to above may be raised in this action by virtue of the fact that the water company is a taxpayer, and hence may attack the validity of an act under which taxes might be assessed against it. That is very true—in the proper place and manner, but not by attempting

to tack a taxpayer's bill on to a cross-bill filed by a resident in an action brought by a non-resident to enforce a contract. Nor does the water company base its attack on section 264a on its right as a taxpayer. It says in its brief in the Court of Appeals (p. 275):

> "But in truth as is evident from a consideration of the entire cross-bill it is not intended to be a taxpayer's bill and was not filed as such. All that is said in the cross-bill upon the subject of the water company's position as a taxpayer is to be found in the 25th paragraph thereof.
>
> It is altogether clear that the purpose of this averment was merely to present to the court the manifest inequity and injustice of permitting the city to commit acts which would inflict irreparable injury upon the water company and at the same time force the water company through the medium of taxation to furnish the funds with which its destruction is to be accomplished."

Taking the water company at its word, we repeat that it cannot be granted an injunction restraining the city from proceeding under section 264a merely because that section is improperly drawn or submitted, or is in conflict with the constitution of Colorado or other provisions of the charter of Denver, as the rights of the water company are not affected or injured by such improper construction or submission or conflict with other laws controlling it. Nor does it show any ground for equitable jurisdiction.

3. The Cross-Bill Cannot Be Sustained as a Taxpayer's Bill.

However, the water company may attempt to abandon the position it has taken and assert that as a taxpayer it has the right to attack the validity of section 264a because of the increased taxes it would be compelled to pay. Indeed, it is only on this theory that the attack made on the validity of section 264a, on the grounds set forth in the cross-bill which are not contained in the bill, could be sustained. The bill, however, is based upon an alleged contract between the city and the water company, and an alleged impairment thereof by the adoption of section 264a of the charter of Denver, or possibly by other acts. So far as the cross-bill is based upon this same contract and the same impairment, it is germane; but if it, or any part of it, is based upon the allegations therein contained that the water company is a taxpayer in Denver, and therefore may attack the validity of section 264a on grounds other than that it impairs the obligation of the contract—as, *e. g.*, that it was not legally adopted—then the cross-bill, or that part of it, is not germane to the bill and must be disregarded.

A court of equity may determine the controversies presented by the original bill and those only, and a cross-bill may not interpose new controversies or new issues between co-defendants, the decision of which is not necessary to a complete determination of the controversies arising upon the original bill.

Cross vs. DeValle, 1 Wall., 1.

Ayers vs. Chicago, 101 U. S., 184.

In Stuart vs. Hayden, 72 Fed., 402, the scope and purpose of a cross-bill were stated as follows (p. 410):

> "A cross-bill is brought either to aid in the defense of the original suit or to obtain a complete determination of the controversies between the original complainant and the cross-complainant over the subject matter of the original bill. It may not interpose new controversies between co-defendants to the original bill, the decision of which is unnecessary to a complete determination of the controversies between the complainant and the defendants over the subject-matter of the original bill. If it does so, it becomes an original bill, and must be dismissed, because there cannot be two original bills in the same case."

It is true that a cross-bill may set forth new facts and raise new issues, but these must be within the controversy embraced in the original bill, and their decision must be necessary to a complete determination of that controversy. The controversy embraced in the original bill is based exclusively upon contract rights between the city and the water company, and no rights not based on that contract may be presented in the cross-bill for adjudication, without violating the rule that a cross-bill must keep within the subject-matter of the original bill; for section 264a may be invalid upon all the grounds set forth in the cross-bill, other than those contained in the bill, and yet the trust company and the water company will be left uninjured, so far as their contract rights are concerned.

Hence the independent attack on section 264a contained in the cross-bill cannot be considered in this

action, as the water company cannot appear in the cross-bill in the double role of a party to a contract and a taxpayer. The fact that it is a taxpayer is wholly immaterial in this suit. It was only its interest in the subject-matter of the suit set forth in the bill that entitled it to maintain the cross-bill; its status as a taxpayer has no relation to the original controversy between the trust company and the city, and with the disappearance of the water company as a taxpayer from the controversy, the independent attack made upon the validity of section 264a cannot be considered, as the only basis on which the water company can justify such an attack is that its rights as a taxpayer will be imperiled by the attempt of the city to carry out the provisions of a void act. And under no consideration can this cross-bill be sustained as a taxpayer's bill, for it alleges no damage to the water company distinct or separate from that common to every other taxpayer in the city, nor is it brought for all others similarly interested as well as for itself.

2 Cooley on Taxation (3rd Ed.), 1429 et seq.

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4. Is Section 264a Void Because It Was Improperly Constructed or Submitted, or is in Conflict with the Constitution of Colorado or Other Parts of the Charter of Denver?

Although we do not believe the validity of section 264a will be inquired into in this court, save as it considers the question of its conflict with the contract clause of the federal constitution, we will examine

briefly the allegations made by the water company against its validity.

The first objection is to the effect that section 264a was submitted to a vote of the electors as an entirety, with no option to the voter to express his will thereon except by a vote in favor of its adoption, including all of the various and sundry matters and things therein contained, or by a vote against its adoption, which necessarily would include a vote against each several proposition therein contained; that it contains numerous different and unrelated matters not germane one to the other nor in *pari materia;* that, owing to the manner in which the matters were submitted, no elector voting in favor of one or more of the numerous things contained in the section, but opposed to others, could vote for those he favored without voting for those to which he was opposed; and that the vote taken is not a fair expression of the will of the voters in regard thereto.

There is a confusion of thought in this argument that is remarkable. It assumes that no law, constitution, charter or amendment can be adopted that embraces more than one matter. But there is no such law; if there were, there could be no valid constitution or charter anywhere, and the fourteenth amendment to the federal constitution would be nugatory. So would the twentieth amendment to the constitution of this state. In fact, the Supreme Court of Colorado, considering that amendment, held that a constitutional amendment *may* embrace more than one subject.

> "It is next contended that the proposed amendment contains several subjects, and

therefore is in fact several amendments, and that the Constitution requires that each amendment shall be separately submitted. The Constitution does not require the submission of separate subjects."

People vs. Sours, 31 Colo., 369, 400.

We see, therefore, that, in the absence of a special inhibition, several distinct and separate subjects may be submitted for consideration. And this, we contend, is the law as to all constitutions, charters, amendments, statutes, ordinances or laws of any kind whatever.

The question of whether an act embraces more than one subject has generally been answered in construing legislative acts; for it is only to them the limitation usually applies. It has been always held that an act to incorporate a city, which also contains provisions relating to the various subjects upon which municipal legislation may be required, embraces but one subject—the creation of the municipality. So the revision of an act incorporating a municipality, such as the acts of 1885 and 1887 of our legislature, has always been construed as embracing but one subject, as has an act to revise and consolidate the several acts in relation to the charter of a city.

Louisiana vs. Pillsbury, 105 U. S., 278.
Montclair vs. Ramsdell, 107 U. S., 147.
Attorney General vs. Amos, 60 Mich., 372.
Harris vs. People, 59 N. Y., 599.

There is a constitutional inhibition in this state against including more than one subject in a legis-

lative "bill," which subject must be expressed in its title (Art. V, sec. 21). In the case of Nesbit vs. The People, 19 Colo., 441, it was attempted to apply this rule to a constitutional amendment, because it had been adopted by the legislature before being submitted to the people; but the court held that it was not applicable, distinguishing between an amendment and a statute, giving as one reason that—

> "It is not essential that the subject of a proposed amendment shall be expressed in its title; a proposed amendment need not have any title except as it designates the article of the constitution to be amended."

Thus we see that a constitutional amendment may embrace more than one subject, and the fact that it is passed by the legislature before being submitted to a popular vote does not identify it with "an ordinary legislative bill." It is clearly recognized that the limitation in case of a legislative "bill" exists only because there is an express provision in the constitution to that effect.

In David vs. Portland, 14 Ore., 98, an amendment to the charter of Portland was adopted by the legislature. It created a waterworks committee, naming them in the bill, and gave them wide powers, and was held to be a valid exercise of the legislative power.

Time was when the charter of Denver was enacted by the legislature, as were all amendments thereto. Were those amendments invalid as embracing more than one matter? In 1885 the legislature passed "An act to reduce the law incorporating the

City of Denver and the several acts amendatory thereto into one act, *and to revise and amend the same.*" In 1887 another act was passed, entitled "An act to amend sections 11 and 13 of Article 4, and section 2 of Article 10, and section 3 of Article 11, of an act entitled 'An act to reduce the law incorporating the City of Denver and the several acts amendatory thereof into one act, and to revise and amend the same,' as approved March 16, A. D. 1885, *and to enact other provisions in relation thereto.*" Were these amendments void as embracing more than one subject? If they were not, then, *a fortiori*, section 264a is not; for at the time the acts of 1885 and 1887 were passed the constituional provision above referred to was in effect, limiting "bills" to one subejct, which was to be expressed in the title. But section 264a was not enacted by the legislature, was not a "bill," and cannot be limited in its scope by that constitutional provision. And if not by it, where can any limitation be found? Where is the law that restricts the scope of section 264a, but which permitted the acts of 1885 and 1887 to embrace any number of subjects?

If section 264a had been enacted by the legislature, its title would probably be "An act to amend the charter of Denver"—a title which embraces but one subject. Or, even if the title expressly stated that it was an act to amend all the provisions of the original charter that counsel say it does amend—to-wit, that part which provides for acquiring public utilities, that part which provides for granting franchises, that part which creates a public utilities commission—would its title be any wider in its scope

than that of the act amending the charter enacted in 1887 by the legislature?

Denver was made a "home-rule" city by Article XX of the constitution of Colorado. When that amendment, was adopted and the city and county was granted thereby the power to make and amend its own charter, it succeeded to all of the powers of the legislature in that respect.

Kiernan vs. Portland, 57 Ore., 454, holds that—

> "The people of this state, by the constitutional amendment heretofore quoted, have seen fit to confer upon municipal corporations the right to enact their own charters; the only limitation upon that right being that such charters shall not conflict with the constitution or the criminal laws of the state. We take it, therefore, that within the limits of the municipality, and for those purposes which are purely municipal, the City of Portland may include in its charter by amendment any provision or right that the legislature might have granted before the Constitution was so amended."

See also:

> Platt vs. San Francisco, 158 Cal., 74.
>
> Ex parte Smith, 231 Mo., 111.
>
> Eugene vs. Willamette Valley Co., 52 Ore., 490.

That charter amendment section 264a does not come within the rule contended for by counsel, see State vs. Riplinger, 30 Wash., 281, wherein it is held

that where a proposed amendment to a city charter, very similar in scope to section 264a, consisted of several sections all relating to the same subject, a description of the amendment on the ballots which required the voter to vote for or against the entire amendment was not objectionable for failure to submit in such form that each section of the amendment might be voted on separately.

> "Two questions are raised on this appeal, viz.: (1) Was the said proposed amendment legally adopted as a part of the city charter of the City of Seattle? * * * It is contended by the appellant that the manner in which these amendments were submitted is opposed to the provisions of the city charter relating to the proposal and adoption of amendments, which provides 'that if more than one amendment be submitted at the same general election the same shall be submitted at such election in such manner that each proposed amendment may be voted on separately without prejudice to the others,' and that inasmuch as there were seven separate sections of the charter in the ballots submitted to the voters at the election, all to be voted upon in one form of ballot the voters were not permitted to segregate the sections which they might favor from those they were opposed to, and that they should have been permitted to vote upon each section separately. We think there can be no substantial objection to the manner in which this amendment was submitted. It

seems plain that it was the intention to submit an entirely different scheme for the control and management of the library and the payment of its expenses; that the amendment proposed was in furtherance of this purpose, and that it was, in substance, an independent amendment. There is no provision that the amendments should be submitted in different sections. As is well said by the respondents: 'There is no more reason in case of amendment in requiring each section to be separately submitted than for requiring each sentence to be so submitted.' That it is the unity of subject that is demanded by the charter provision requiring each amendment to be submitted separately. It appears evident from the language of the amendment that it was the intention that the new provision, as a whole, should be substituted in lieu of the old provision as a whole. That being so, the voter was not deprived of the right to exercise his choice in voting upon the amendment."

State vs. Riplinger, 30 Wash., 281.

In People vs. Sours, 31 Colo., 369, 401, the Supreme Court of this state said in regard to the twentieth amendment to the state constitution, which created the City and County of Denver:

"But even if we were to regard this amendment as an act of the legislature it could still be sustained as against the objection that it embraces more than one subject,

> and can be sustained by the decisions of this court and by the decisions of many of the states of the Union. * * * The Supreme Court of the state of Missouri in the case of Wolfe v. Bronson, 115 Mo., 271, in construing this section of their Constitution, said: 'If all the provisions of the bill have a natural relation and connection then the subject is single, and this, too, though the bill contains many provisions.' "

There can be no question that the charter is the fundamental or organic law of the city, as Article XX of the constitution of Colorado expressly so provides. It might be proper to require that amendments to the city's charter should be limited to one subject, or that no amendment should repeal more than six sections of the charter (as the constitution of Colorado provides in case of constitutional amendments); but no such limitation has been made, nor can any such limitation be implied from any of the powers granted. The city is granted the broad power to make or amend its charter, and in the absence of any express or implied limitation on the powers of the city in amending its charter, it cannot be limited to one subject in making such amendment any more than it is limited as to the original charter. And there is a very practical objection to such a limitation.

> "If the doctrine suggested is not applicable the enactment or amendment of a municipal charter, by voting for separate sections might destroy the efficacy of the pro-

posed plan of City government or very much delay its adoption."

Eugene vs. Willamette Valley Co., 52 Ore., 490.

But section 264a embraces only one subject; all matters included therein are germane to the fundamental subject. It provides for a public utilities commission, gives it power over public utilities, and specifically provides a mode of procedure to be followed in acquiring a water system for Denver.

If section 264a had created a public utilities commission and provided for acquiring a water plant, a lighting plant and a sewer system, as well as the method of acquiring all of these, would not the act embrace only one subject and matters germane thereto? Then, as a part can never be greater than the whole, if the provisions regarding a lighting plant and a sewer system are omitted, does the present act embrace more than one subject?

Counsel contend that their objection to section 264a is not because it embraces more than one subject, but because each proposition set forth therein was not submitted to the people, so that they could have an opportunity of voting "Yes" or "No" thereon without being compelled to vote in favor of or against the whole amendment; that, in other words, the people should have been granted the opportunity of voting on the proposition of creating a public utilities commission separately, and on the proposition of acquiring the property of The Denver Union Water Company, and on the construction of a municipal plant, etc., etc. But this question is embraced in the

broader question of what a charter amendment may embrace. If a charter amendment is not limited to one matter, but may embrace the matters included in section 264a, then it may and must be submitted as a whole. The Supreme Court of Colorado said, in the Sours case, cited *supra:*

> "It is next contended that the proposed amendment contains several subjects, and therefore is in fact several amendments."
>
> People vs. Sours, 31 Colo., 369.

This is the same argument, and the answer is the same. In the Sours case the court said that the constitution does not require the submission of separate subjects; and the answer in this case is that neither the constitution nor any law or charter requires the submission of separate subjects. The whole question is one of power: Had the state or the city the power to submit the amendment, Article XX, or section 264a, as the case may be, in the form in which it was submitted? The power exists in the state to amend its constitution, and in the city to amend its charter. Where is the limitation found in either case which requires each separate matter embraced in the amendment to be submitted separately? In the Nesbit case, as we have shown, it was attempted to bring a constitutional amendment within the lines laid down in case of a legislative bill, but the court said the rule did not apply. And if it did not apply there, where the constitutional amendment was first passed by the legislature, how can it apply here, where the legislature had nothing to do with the amendment? And if that constitutional provision is not applicable, where is the limitation found?

There is no reason why in a charter amendment a voter should be able to vote for one matter contained therein and against another, any more than there is in case of a constitutional amendment. Unless there is some express or implied limitation, the charter amendment is no more restricted to one matter than a constitutional amendment.

There are cases of submissions by city councils of questions to a vote which have been held void. But those were almost all questions of voting a specific sum of money to be used for more than one purpose, where the voter did not have an opportunity of expressing himself for or against each proposition. Such a submission is very different from the submission of a charter amendment, and the questions raised therein are very different from those raised in the case at bar. In them the question is whether an appropriation of a certain amount shall be made to be used, the proposed object being indefinite. In this case the point raised by the defendant is that the voter should have had the opportunity to vote on, first, the proposed contract for the acquisition of the property of The Denver Union Water Company, and its associate and subsidiary corporations, at the price and upon the terms therein named; second, the election of Anderson, Van Cise and Fellows as members of and to constitute the Public Utilities Commission; third, the creation of the Public Utilities Commission, and the definition of its powers and duties; fourth, the proposed acquisition by construction of an independent and complete waterworks system; and, fifth, the authorization and issuance of bonds in the sum of $8,000,000 for one or the other of the purposes aforesaid. The difference between this charter amendment

and submissions involving the expenditure of the appropriation for a number of different and totally unlike objects is apparent; the question being in each case one of power, and of the construction of the laws, whether constitutional or statutory, conferring or restricting the power. To adopt counsel's contention would be to require the holding of five separate elections before the city could construct a municipal plant.

The court, in Denver vs. Hayes, 28 Colo., 110, held that the submission of the question of the issuance of $400,000 bonds for eleven different purposes, without specifying the amount to be devoted to each purpose, was void, because in conflict with constitution and charter. The court said:

> "The precise question for determination, therefore, is * * * whether the City Council in its proceedings leading up to the issue of these bonds has observed the provisions of the Charter;"

and further says that, while this method of submission is not expressly forbidden, it is so by necessary implication and is a clear evasion of the law.

There are decisions which seem to recognize a "natural right" in the voter to have questions submitted to him in a certain manner. But as the right to vote is not a "natural right," we cannot conceive that a voter can have a "natural right" to a certain manner of submission. Both the right to vote and the manner of submission are created and regulated by positive law, and in such law alone we must look for any supposed requirements in regard to the mode of

presenting a question to voters. The court must ask: Had the city the power to submit the amendment in the form in which it did submit it? and not: Had the voters the right to require each separate matter provided for in the amendment submitted to them separately?

Nash vs. Council Bluffs, 174 Fed., 182.

Farmers Loan & Trust Co. vs. Sioux Falls, 136 Fed., 721.

Garrigus vs. Commissioners, 39 Ind., 66.

Swann vs. City of Murray, 146 Ky., 148.

State vs. Allen, 183 Mo., 283.

And, furthermore, we may well question the right of the water company to complain of any wrong done to the voter.

Kiernan vs. Portland, 223 U. S., 151, 164.

If our constitution did not provide that not more than six sections can be amended at one election, who doubts that twelve or twenty could be amended? And if the constitution did not limit legislative "bills" to one subject, who will deny that they might embrace two or three or twenty? Indeed, it was because bills did previously embrace more than one subject, *and were held valid notwithstanding*, that this particular provision was incorporated in the constitutions of Colorado and other states. And, in the absence of some limitation on the power of the City and County of Denver to amend its charter—some requirement that each matter brought forward as an amendment must be submitted and voted upon separately—how can anyone say that this must be done? And if an

amendment must be split up this way, must not an original charter? The charter under which we are governed embraces many matters, but is it void because it was not submitted and adopted piecemeal, section by section, sentence by sentence?

Another ground of invalidity of section 264a, asserted by counsel, is that the matters and things contained in the amendment do not constitute a proper amendment, but a new and independent charter or charter provision, complete in itself, relating to supplying the city with water, and should have been adopted and submitted by a charter convention.

We do not believe that counsel are serious in this contention that section 264a is an entire charter. As to a charter "provision," either that term is so indefinite and general as to include an amendment, or else counsel give it some meaning of which we are ignorant. Article XX of the Colorado constitution provides for a method of calling a charter convention, but does not require such a convention to be called, even by implication, for the purpose of submitting anything but an entire new charter. (See Appendix.) Respondents' contention would lead us to the conclusion that Denver has two charters at the same time, and may have twenty.

Counsel's contention seems either to be that, as section 264a adds something to the charter that was not in it before—i. e., a public utilities commission—therefore it is not an amendment, but a new charter; or that, as the charter provides a method for its "amendment," "alteration" and "revision," and as this is not an "amendment," but an "alteration" or "revision," therefore it must be accomplished by a

charter convention, as the initiative section under which section 264a was adopted only permits it to be used in case of an amendment.

What, then, is an amendment? The Supreme Court of Colorado, in People vs. Sours, cited *supra*, in considering Article XX of the constitution, quoted with approval from State vs. Timme, 54 Wis., 318:

> "The word 'amendment' is clearly susceptible of a construction which would make it cover several propositions, all tending to effect and carry out one general object or purpose, and all connected with one purpose, as well as of the construction that every proposition which effects a change in the constitution, or adds to or takes from it, is an amendment."

In Board of Public Instruction vs. Board of Commissioners, 58 Fla., 391, the court said:

> "An amendment of a constitution repeals or changes some provision in or adds something to the instrument amended."

As section 264a is therefore a proper amendment, it is not necessary that it should have been adopted by a charter convention, but its adoption by the method provided in Article XX was proper.

It is further urged that section 264a is void, because it provides a different method of granting a franchise from that contained in section 4 or Article XX of the constitution.

Section 4 reads as follows:

> "No franchise relating to any street, alley or public place of said City and County shall be granted except upon the vote of the qualified tax-paying electors, and the question of its being granted shall be submitted to such vote upon deposit with the treasurer of the expense * * * ."

This is a *limitation* upon the power of the city to grant a franchise. It provides that no franchise shall be granted except upon certain conditions, but it does not require the city to grant a franchise under those conditions and none other. Furthermore, Article XX empowers the city to acquire all kinds of public utilities, and it would be incorrect to say that, after the city had acquired any utility under the powers granted to it in Article XX, it was compelled under the terms of the same article to grant franchises to other parties. And there is nothing in section 264a that conflicts with the above provision of Article XX in regard to franchises. There is nothing in section 264a to prevent anyone from presenting a petition to the council for a franchise to use the streets of Denver. Section 264a provides that *"nothing in the preceding sections or in this charter,* except as herein specifically provided, shall apply to the acquisition or operation of a waterworks, or supplying the City and County of Denver and its inhabitants with water for all uses and purposes." There is no attempt to limit Article XX as to granting of franchises, nor any attempt to impose any limitations on

the method of acquiring "franchises relating to any street, alley or public place." Such a franchise is entirely different from a franchise to supply the city and its inhabitants with water. The Denver Union Water Company, for instance, can still ask for a franchise to lay its pipes along the streets of Denver under Article XX. Hence it cannot be said that section 264a is void because it conflicts with Article XX in regard to granting franchises. And even if it did conflict, that would not invalidate the whole section, but only that part would be void which does conflict; and we do not believe that part can be found. And, furthermore, that is not a matter of which the water company can take advantage in this action.

It is further contended that section 264a of the charter is void because it provides a method of acquiring a public utility different from the manner provided in Article IX of the charter. This is as much as to say that Amendment XII of the constitution of the United States, providing for the method of electing the President, is void because it is contrary to clause 3 of section 1 of Article II of the constitution; in other words, that an amendment does not supplant and repeal those provisions of the original instrument with which it conflicts. If we adopt counsel's contentions *in toto*, there cannot be an "amendment" introducing anything new into the charter, and an amendment modifying anything old is void.

But the rule is: Where there is a repugnancy between a constitutional amendment and some provision in the original which cannot be so construed

as to have them both stand, the original must be deemed to have been repealed by the amendment.

Board of Public Inst. vs. Board of Comr's, 58 Fla., 391.

People vs. Angel, 109 N. Y., 564.

Popfinger vs. Yutte, 102 N. Y., 38.

State vs. Cox, 8 Ark., 436.

Austin vs. McCall (Tex. Civ. App.), 67 S. W., 192. (Not officially reported.)

State vs. Riplinger, 30 Wash., 281.

Rudolph vs. Hutchinson, 134 Wis., 283.

It is also contended that section 264a is void because it named the persons to fill the office of public utilities commissioners.

But this is no more than the objection that has heretofore been made as to the submission of more than one matter in an amendment.

The constitution of this state contains no provisions governing the election of municipal officers, and in absence of such restriction the city and county must have the power to provide such regulations and provisions as it sees fit. The charter provides that the general election law of the state shall be in effect in the city and county except as otherwise provided in the charter, but the naming of the commissioners is clearly such provision otherwise.

This disposes of the non-federal questions raised by the water company in regard to section 264a of the charter. But there are certain federal questions which it alleges it has the right to raise even in the absence of any contractual relation existing between it and the City and County of Denver.

5. Is Section 264a Void Because in Conflict with Provisions of the Federal Constitution Other Than Those Relied on in the Bill?

There is an allegation that by reason of certain acts of the city the water company is deprived of its property without due process of law. There is, however, no attempt on the part of anyone to take the property of the water company unless the company desires to sell it. This court has held that to construct and maintain a municipal plant is not to deprive a private water company of its property without due process of law,

> Knoxville Water Co. vs. Knoxville, 200 U. S., 22.

And there seems to be nothing more to the company's contention than that which was made in the Knoxville case.

It is also contended that by the enactment of section 264a of the charter the water company is denied the equal protection of the laws, because there is thereby created a distinction between water companies and other public utilities; but as that distinction has always been made in our statutes, which, while limiting the amount of indebtedness which may be incurred by cities, expressly exempts debts incurred in acquiring waterworks from this limitation, the arid condition of the state which is set forth so eloquently in the bill making such a classification reasonable, we believe this contention is without merit. It is also contended that there is a discrimination between The Denver Union Water Company and other water companies; but no proof appears in the

record in support of this. It is also contended that by the adoption of Article XX of the Constitution of Colorado, which creates the City and County of Denver, the republican form of government established by the federal constitution is destroyed. We think this argument has been disposed of by this court in other cases.

Pacific States Tel. & Tel. Co. vs. Oregon, 223 U. S., 118.

Taylor vs. Beckham, 178 U. S., 548.

Luther vs. Borden, 7 How., 1.

Therefore, we contend that the defendant has not produced one argument that can be sustained attacking the validity of section 264a. It is a charter amendment and not a "bill," and need not be limited to one matter. Even if it were limited to one subject, it would be found to contain only one subject, and matters germane thereto and in *pari materia*. Being a charter amendment, it is not necessary that each matter contained therein should have been separately submitted. It is not a new and entire charter, and hence there was no necessity of calling a charter convention to consider it. It amends and changes the provisions of the old charter that conflict with it, and therefore there is no necessity of its conforming with Article IX of the charter. It in no manner changes the provisions of Article XX of the constitution, but complies with them strictly. It is contrary to no constitution or statute in creating an office and filling it at the same election, and the nominations for the offices created thereby were not required to be made as those for other offices were. Nor does it deprive

the company of its property without due process of law, or deny it the equal protection of the laws. If there is any virtue in the attacks made by the water company on section 264a, it is only because that section impairs the obligation of its contract, and this is consequently identical with the attack made by the trust company.

VII.

THE TEMPORARY INJUNCTION RESTRAINING THE CITY FROM ACTING UNDER THE PROVISIONS OF SECTION 264A OF THE CHARTER WAS GRANTED IMPROVIDENTLY AND CONTRARY TO THE FEDERAL STATUTE.

The judge of the District Court for the District of Colorado had no power, jurisdiction or authority to hear the applications for injunctions made by the New York Trust Company and The Denver Union Water Company, or to grant the orders of injunction.

The federal question claimed to be stated in the bill and the basis of the application of the injunction prayed for was, as has been heretofore shown, an alleged impairment of the obligation of a contract between the city and the water company, by the former, in adopting section 264a as part of its charter.

The City and County of Denver was created by the adoption of the twentieth amendment to the constitution of the state of Colorado, and under it "the people of the City and County of Denver are hereby vested with and they shall always have the exclusive power in making, altering, revising or amending their charter." The city and county is a "home-rule" city,

but of course, unless section 264a is held to be an act of the state or an act authorized by the state, it does not come within the inhibition of the federal constitution. If the act, then, is an act of the state, the officers who are to execute that act, whose offices are created by the act, whose powers are granted by it and whose duty it is to enforce it, must be officers of the state in the eyes of the court.

In the case at bar the temporary injunction was issued, as the record shows, by one judge alone—the district judge for Colorado sitting as a judge of the Circuit Court.

Section 17 of the act of Congress of June 18, 1910, Ch. 309, 36 Stat. 539, 557, provides:

> "that no interlocutory injunction suspending or restraining the enforcement, operation or execution of any statute of a state by restraining the action of any officer of such state in the enforcement or execution of such statute shall be issued or granted by any justice of the Supreme Court or by any Circuit Court of the United States or by any judge therof or by any district judge acting as circuit judge upon the ground of the unconstitutionality of such statute unless the application for the same shall be presented to a justice of the Supreme Court of the United States or to a Circuit Judge or to a district judge acting as circuit judge and shall be heard and determined by three judges, one of whom at least shall be a justice of the Supreme Court of the United States or a circuit judge and the other two may be either

> circuit or district judges and unless a majority of such three judges shall concur in granting such application * * *."

The interlocutory injunctions in this case were directed to all of the defendants except the water company, including the mayor, clerk, auditor, Public Utilities Commission and Election Commission of the City and County of Denver, and suspended and restrained the enforcement, operation and execution of section 264a—an amendment to the charter of the City and County of Denver. This section has the same force and dignity as a statute itself would have possessed had it been enacted by the General Assembly, instead of being adopted by the initiative under Article XX of the constitution of Colorado; it is not a mere ordinance of the city.

In Londoner vs. City and County of Denver, 119 Pac., 156 (not officially reported), the Supreme Court of Colorado said in regard to the charter to which section 264a is an amendment:

> "The Charter of the City and County of Denver adopted in obedience to an express mandate of the Constitution of the State, with respect to municipal matters * * * has all the force and effect of an act of the legislature."

See also:

> Kiernan vs. Portland, 57 Ore., 454.
> Platte vs. San Francisco, 158 Cal., 74.
> Ex parte Smith, 231 Mo., 111.

In New Orleans Waterworks Company vs. Louisiana Sugar Company, 125 U. S., 18, at page 31, the Supreme Court quoted Williams vs. Bruffy, 96 U. S., 176, 183, to the effect that—

> "Any enactment from whatever source originating to which a state gives the force of law is a statute of the state within the meaning of the clause relating to the jurisdiction of this court."

It also decided that—

> "A by-law or ordinance of a municipal corporation may be such an exercise of legislative power delegated by the legislature to the corporation as a political subdivision of the state having all the force of the law within the limits of the municipality that it may be considered as a law"

within the meaning of the contract clause of the constitution.

In Hamilton Gas Light Company vs. Hamilton City, 146 U. S., 258, it is expressly held that a municipal ordinance not passed under legislative authority is not a law of the state within the meaning of the constitutional prohibition against state laws impairing the obligation of contracts. The converse of this proposition is equally true.

And the Circuit Court of Appeals, in its opinion in the instant case, has everywhere referred to section 264a as a law enacted by the authority of the state, and has based its opinion, as stated above, on the impairment of the contract by that section in opposition to the federal constitution.

See also:

Moore vs. New Orleans, 32 La. Ann., 726.

American Waterworks Company vs. Home Water Company, 115 Fed., 171, 178.

Citizens St. R. Company vs. City Railway Company, 56 Fed., 746, 750.

Iron Mountain Company vs. Memphis, 96 Fed., 113, 120.

Mercantile Trust Company vs. Collins Park Co., 99 Fed., 812.

The provisions of section 264a *ex vi termini* imposed the duty of enforcing it upon the commission which it creates. Now, if it is true that a charter amendment or an ordinance violating the contract clause of the federal constitution is invested with all the force and dignity of a state statute, it must follow that the agencies appointed to effectuate its purpose must be of a character and dignity equal to the statute complained of. In other words, the officer or commission charged with the duty of executing, and who are attempting to execute, its provisions must be the officer or commision contemplated by the statute above quoted. To hold otherwise would be to give the act complained of, not only a double, but wholly inconsistent, construction; for it appears to be self-evident that, if the enactment in controversy constitutes in effect a statute of a state, it must be considered as a state law. If, as such, it conflicts with the contract clause of the constitution, then the agency to effectuate it must be an agency created by the authority of the state, and therefore clothed with the same

dignity which it would possess had the law been enacted by the legislature itself.

In Iron Mountain Co. vs. Memphis, quoted *supra*, Judge Taft, delivering the opinion of the court, said:

> "The *ratio decidendi* of the court's conclusion is that the legislature may give to a corporation such power as it chooses, but that in doing so it only vests it with the power of the state as a state agency. When, therefore, the taxing district of the county of Shelby, made a contract with the complainant company by which it secured to that company for fifty-five years occupancy of Kentucky avenue, it was acting as an agent of the state, and as a trustee of the public at large. When now the city of Memphis, as the successor of the taxing district, comes to assert the rights secured to it by that contract, it is asserting the rights of the state and of the public at large as a state agent."

This language is directly applicable to the controversy at bar. The City of Denver was a state agency when it exercised its power to contract with the assignor of The Denver Union Water Company. The Public Utilities Commission is a state agency in effectuating the provisions of section 264a. The same principle runs through all the cases upon the subject.

Prout vs. Starr, 188 U. S., 537.

Pennoyer vs. McConnaughy, 140 U. S., 1.

It is true that the officers who were restrained from enforcing the provisions of section 264a did not

have state-wide duties imposed upon them, but it does not follow that a functionary is not an officer of the state because his tenure of office or his duties are local in character. Even if the Public Utilities Commission had not been created in and by section 264a, and the members thereof had not been named therein, still municipal officers have generally been regarded as officers of the state. The constitution of Colorado forbids any member of the legislature being appointed to any state office, and the Supreme Court of Colorado in a very recent, unreported case, entitled Hilts vs. Arnold, held that the assessor of the City and County of Denver was a state officer, and that a member of the state legislature could not be appointed to that office.

In State vs. Curley, 5 Colo., 412, a police magistrate was declared to be an officer of the state because his duties concerned the state at large or the general public, although exercised within defined limits.

To the same effect is *re* Newport Charter, 14 R. I., 655.

In Attorney General vs. Detroit, 112 Mich., 145, upon an exhaustive review of all the authorities it was held that the mayoralty was an office "under the state" within the meaning of the constitution, and therefore could not be held by the governor. This case, with those which it cites for its support, sustains our contention that the mayor, treasurer, auditor and Public Utilities Commission are, and each of them is, an officer of the state within the purview of the act of Congress of June 18, 1910.

In State vs. Valle, 41 Mo., 29, a member of the General Assembly was appointed a member of the

Board of Water Commissioners of St. Louis by the mayor. It was held that the office was a civil office under the state as contemplated in that clause of the constitution of Missouri which prohibited appointment of any senator or representative during the term for which he shall have been elected to any civil office under the state.

The evident purpose of the federal statute is to limit the power of the federal judiciary whenever its jurisdiction is invoked to restrain the operation, execution or enforcement of a state statute. The frequency with which this jurisdiction has been invoked and exercised in recent times, thereby temporarily crippling the operation of laws afterwards upheld, doubtless impressed Congress with the necessity of requiring extraordinary methods of procedure in order to suspend or prevent the discharge by the local authorities of the duties imposed upon them by state law.

It is inconsistent to hold that the act of a city is a state act to the extent of vesting the federal court with jurisdiction, and at the same time to hold that the act of the city is not a state act to the extent of bringing it within the protection afforded by Congress against the improvident granting of injunctions. It is too late at this day to argue that an act of a municipality, apparently under the authorization of a statute, does not come within the purview of section 10, Article I, of the constitution of the United States, for this court has frequently held to the contrary. But, having so held, in order to be consistent and to make its decision have a favorable effect on the minds of fair-minded men, it must also hold that an

act of the city is an act of the state within the purview of the federal statute.

This being so, what is the effect of the injunctions in this case?

In *Ex parte* Metropolitan Water Co., 220 U. S., 539, this court said:

> "Congress having declared that the merits of the application for an interlocutory injunction such as that applied for in the case with which we are concerned, should be considered and determined by a tribunal consisting of three judges constituted as provided in the act, it results that a tribunal not so constituted, did not possess jurisdiction over the subject-matter of the right to such injunction. *It follows therefore that in hearing and determining the application for the temporary injunction the single judge acted without jurisdiction and that the order * * * was void.*" (italics ours.)

In that case the order denied the petition for an injunction, and in the case at bar a temporary injunction was granted in accordance with the prayer of the bill, and also a temporary injunction was granted in accordance with the prayer of the cross-bill; but the reasoning is applicable to both cases, and therefore the Circuit Court of Appeals for the Eighth Judicial Circuit should have declared each of the orders of temporary injunction granted in this case void *suo motu*.

We submit that the orders of the Circuit Court within and for the District of Colorado granting temporary injunctions upon the bill, and also upon the cross-bill, are erroneous, and that the decision of the Circuit Court of Appeals in affirming those orders of temporary injunction is also erroneous, and that the orders of the Circuit Court granting the interlocutory injunctions here under review were unauthorized and void *ab initio;* and the petitioners therefore pray that the judgment of the Circuit Court of Appeals for the Eighth Judicial Circuit affirming the interlocutory injunctions of the Circuit Court be reversed, and that the cause be remanded to the United States Circuit Court of Appeals for the Eighth Judicial Circuit, with instructions to reverse the interlocutory orders of injunction granted by the Circuit Court within and for the District of Colorado, and to remand the cause to the United States District Court within and for the District of Colorado, with directions to dissolve the interlocutory injunction granted upon the prayer of the bill, and the interlocutory injunction granted upon the prayer of the cross-bill, and to dismiss both the bill and the cross-bill.

Respectfully submitted,

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APPENDIX

ARTICLE XX OF THE CONSTITUTION OF COLORADO.

CITY AND COUNTY OF DENVER.

Incorporation.

Section 1. The municipal corporation known as the city of Denver, and all municipal corporations and that part of the quasi-municipal corporation known as the county of Arapahoe, in the state of Colorado, included within the exterior boundaries of the said city of Denver as the same shall be bounded when this amendment takes effect, are hereby consolidated and are hereby declared to be a single body politic and corporate, by the name of the "City and County of Denver." By that name said corporation shall have perpetual succession, and shall own, possess and hold all property, real and personal, theretofore owned, possessed or held by the said city of Denver and by such included municipal corporations, and also all property, real and personal, theretofore owned, possessed or held by the said county of Arapahoe, and shall assume, manage and dispose of all trusts in any way connected therewith; shall succeed to all the rights and liabilities, and shall acquire all benefits, and shall assume and pay all bonds, obligations and indebtedness of said city of Denver and of said included municipal corporations and of the county of Arapahoe; by that name may sue and defend, plead and be impleaded, in all courts and places, and in all matters and proceedings; may have and

use a common seal and alter the same at pleasure; may purchase, receive, hold and enjoy, or sell and dispose of, real and personal property; may receive bequests, gifts, and donations of all kinds of property, in fee simple, or in trust for public, charitable or other purposes; and do all things and acts necessary to carry out the purposes of such gifts, bequests and donations, with power to manage, sell, lease or otherwise dispose of the same in accordance with the terms of the gift, bequest or trust; shall have the power, within or without its territorial limits, to construct, condemn and purchase, purchase, acquire, lease, add to, maintain, conduct and operate, water works, light plants, power plants, transportation systems, heating plants, and any other public utilities or works or ways local in use and extent, in whole or in part, and everything required therefor, for the use of said city and county and the inhabitants thereof, and any such systems, plants or works or ways, or any contracts in relation or connection with either, that may exist and which said city and county may desire to purchase, in whole or in part, the same or any part thereof may be purchased by said city and county which may enforce such purchase by proceedings at law as in taking land for public use by right of eminent domain, and shall have the power to issue bonds upon the vote of the taxpaying electors, at any special or general election, in any amount necessary to carry out any of said powers or purposes, as may by the charter be provided.

The general annexation and consolidation statutes of the state shall apply to the city and county of Denver to the same extent and in the same manner

that they would apply to the city of Denver if it were not merged, as in this amendment provided, into the city and county of Denver. Any contiguous town, city or territory hereafter annexed to or consolidated with the city and county of Denver, under any of the laws of this state, in whatsoever county the same may be at the time, shall be detached per se from such other county and become a municipal and territorial part of the city and county of Denver, together with all property thereunto belonging.

The city and county of Denver shall alone always constitute one judicial district of the state.

Officers.

Sec. 2. The officers of the city and county of Denver shall be such as by appointment or election may be provided for by the charter; and the jurisdiction, term of office, duties and qualifications of all such officers shall be such as in the charter may be provided; but every charter shall designate the officers who shall, respectively, perform the acts and duties required of county officers to be done by the constitution or by the general law, as far as applicable. If any officer of said city and county of Denver shall receive any compensation whatever, he or she shall receive the same as a stated salary, the amount of which shall be fixed by the charter, and paid out of the treasury of the city and county of Denver in equal monthly payments.

Transfer of Government.

Sec. 3. Immediately upon the canvass of the vote showing the adoption of this amendment, it shall

be the duty of the governor of the state to issue his proclamation accordingly, and thereupon the city of Denver, and all municipal corporations and that part of the county of Arapahoe within the boundaries of said city, shall merge into the city and county of Denver, and the terms of office of all officers of the city of Denver and of all included municipalities and of the county of Arapahoe shall terminate; except, that the then mayor, auditor, engineer, council (which shall perform the duties of a board of county commissioners), police magistrate, chief of police and boards, of the city of Denver shall become, respectively, said officers of the city and county of Denver, and said engineer shall be ex officio surveyor and said chief of police shall be ex officio sheriff of the city and county of Denver; and the then clerk and ex officio recorder, treasurer, assessor and coroner of the county of Arapahoe, and the justices of the peace and constables holding office within the city of Denver, shall become, respectively, said officers of the city and county of Denver, and the district attorney shall also be ex officio attorney of the city and county of Denver. The foregoing officers shall hold the said offices as above specified only until their successors are duly elected and qualified as herein provided for; except that the then district judges, county judge and district attorney shall serve their full terms, respectively, for which elected. The police and firemen of the city of Denver, except the chief of police as such, shall continue severally as the police and firemen of the city and county of Denver until they are severally discharged under such civil service regulations as shall be provided by the charter; and every charter shall

provide that the department of fire and police and the department of public utilities and works shall be under such civil service regulations as in said charter shall be provided.

First Charter.

Sec. 4. The charter and ordinances of the city of Denver as the same shall exist when this amendment takes effect, shall, for the time being only, and as far as applicable, be the charter and ordinances of the city and county of Denver; but the people of the city and county of Denver are hereby vested with and they shall always have the exclusive power in the making, altering, revising or amending their charter and, within ten days after the proclamation of the governor announcing the adoption of this amendment the council of the city and county of Denver shall, by ordinance, call a special election, to be conducted as provided by law, of the qualified electors in said city and county of Denver, for the election of twenty-one taxpayers who shall have been qualified electors within the limits thereof for at least five years, who shall constitute a charter convention to frame a charter for said city and county in harmony with this amendment. Immediately upon completion, the charter so framed, with a prefatory synopsis, shall be signed by the officers and members of the convention and delivered to the clerk of said city and county who shall publish the same in full, with his official certification, in the official newspaper of said city and county, three times, and a week apart, the first publication being with the call for a special election, at which the qualified electors of said city and county

shall by vote express their approval or rejection of the said charter. If the said charter shall be approved by a majority of those voting thereon, then two copies thereof (together with the vote for and against) duly certified by the said clerk, shall, within ten days after such vote is taken, be filed with the secretary of state, and shall thereupon become and be the charter of the city and county of Denver. But if the said charter be rejected, then, within thirty days thereafter, twenty-one members of a new charter convention shall be elected at a special election to be called as above in said city and county, and they shall proceed as above to frame a charter, which shall in like manner and to the like end be published and submitted to a vote of said voters for their approval or rejection. If again rejected, the procedure herein designated shall be repeated (each special election for members of a new charter convention being within thirty days after each rejection) until a charter is finally approved by a majority of those voting thereon, and certified (together with the vote for and against) to the secretary of state as aforesaid, whereupon it shall become the charter of the said city and county of Denver and shall become the organic law thereof, and supersede any existing charters and amendments thereof. The members of each of said charter conventions shall be elected at large; and they shall complete their labors within sixty days after their respective election.

Every ordinance for a special election of charter convention members shall fix the time and place where the convention shall be held, and shall specify the compensation, if any, to be paid the officers and members thereof, allowing no compensation in case of non-attendance or tardy attendance, and shall fix the time

when the vote shall be taken on the proposed charter, to be not less than thirty days nor more than sixty days after its delivery to the clerk. The charter shall make proper provision for continuing, amending or repealing the ordinances of the city and county of Denver.

All expenses of charter conventions shall be paid out of the treasury upon the order of the president and secretary thereof. The expenses of elections for charter conventions and of charter votes shall be paid out of the treasury upon the order of the council.

No franchise relating to any street, alley or public place of the said city and county shall be granted except upon the vote of the qualified taxpaying electors, and the question of its being granted shall be submitted to such vote upon deposit with the treasurer of the expense (to be determined by said treasurer) of such submission by the applicant for said franchise. The council shall have power to fix the rate of taxation on property each year for city and county purposes.

New Charters, Amendments or Measures.

Sec. 5. The citizens of the city and county of Denver shall have the exclusive power to amend their charter or to adopt a new charter, or to adopt any measure as herein provided;

It shall be competent for qualified electors in number not less than five per cent. of the next preceding gubernatorial vote in said city and county to petition the council for any measure, or charter amendment, or for a charter convention. The council shall submit the

same to a vote of the qualified electors at the next general election not held within thirty days after such petition is filed; whenever such petition is signed by qualified electors in number not less than ten per cent. of the next preceding gubernatorial vote in said city and county, with a request for a special election, the council shall submit it at a special election to be held not less than thirty nor more than sixty days from the date of filing the petition; *Provided*, That any question so submitted at a special election shall not again be submitted at a special election within two years thereafter. In submitting any such charter, charter amendment or measure, any alternative article or proposition may be presented for the choice of the voters, and may be voted on separately without prejudice to others. Whenever the question of a charter convention is carried by a majority of those voting thereon, a charter convention shall be called through a special election ordinance as provided in section four (4) hereof, and the same shall be constituted and held and the proposed charter submitted to a vote of the qualified electors, approved or rejected, and all expenses paid, as in said section provided.

The clerk of the city and county shall publish, with his official certification, for three times, a week apart, in the official newspaper, the first publication to be with his call for the election, general or special, the full text of any charter, charter amendment, measure, or proposal for a charter convention, or alternative article or proposition, which is to be submitted to the voters. Within ten days following the vote the said clerk shall publish once in said newspaper the full text of any charter, charter amendment, measure, or proposal for a charter convention,

or alternative article or proposition, which shall have been approved by a majority of those voting thereon, and he shall file with the secretary of state two copies thereof (with the vote for and against) officially certified by him, and the same shall go into effect from the date of such filing. He shall also certify to the secretary of state, with the vote for and against, two copies of every defeated alternative article or proposition, charter, charter amendment, measure or proposal for a charter convention. Each charter shall also provide for a reference upon proper petition therefor, of measures passed by the council to a vote of the qualified electors, and for the initiative by the qualified electors of such ordinances as they may by petition request.

The signatures to petitions in this amendment mentioned need not all be on one paper. Nothing herein or elsewhere shall prevent the council, if it sees fit, from adopting automatic vote registers for use at elections and references.

No charter, charter amendment or measure adopted or defeated under the provisions of this amendment shall be amended, repealed or revived, except by petition and electoral vote. And no such charter, charter amendment or measure shall diminish the tax rate for state purposes fixed by act of the general assembly, or interfere in any wise with the collection of state taxes.

Cities of the First and Second Class.

Sec. 6. Cities of the first and second class in this state are hereby empowered to propose for submission to a vote of the qualified electors, proposals for char-

ter conventions and to hold the same, and to amend any such charter, with the same force and in the same manner and have the same power, as near as may be, as set out in sections four (4) and five (5) hereof, with full power as to real and personal property and public utilities, works or ways, as set out in section one (1) of this amendment.

School Districts Consolidated.

Sec. 7. The city and county of Denver shall alone always constitute one school district, to be known as District No. 1, but its conduct, affairs and business shall be in the hands of a board of education consisting of such numbers, elected in such manner as the general school laws of the state shall provide, and until the first election under said laws of a full board of education which shall be had at the first election held after the adoption of this amendment, all the directors of school district No. 1, and the respective presidents of the school boards of school districts Nos. 2, 7, 17 and 21, at the time this amendment takes effect, shall act as such board of education, and all districts or special charters now existing are hereby abolished.

The said board of education shall perform all the acts and duties required to be performed for said district by the general laws of the state. Except as inconsistent with this amendment, the general school laws of the state shall, unless the context evinces a contrary intent, be held to extend and apply to the said "District No. 1."

Upon the annexation of any contiguous municipality which shall include a school district or districts

or any part of a district, said school district or districts or part shall be merged in said "District No. 1," which shall then own all the property thereof, real and personal, located within the boundaries of such annexed municipality, and shall assume and pay all the bonds, obligations and indebtedness of each of the said included school districts, and a proper proportion of those of partially included districts;

Provided, however, That the indebtedness, both principal and interest, which any school district may be under at the time when it becomes a part, by this amendment or by annexation, of said "District No. 1," shall be paid by said school district so owing the same by a special tax to be fixed and certified by the board of education to the council which shall levy the same upon the property within the boundaries of such district, respectively, as the same existed at the time such district becomes a part of said "District No. 1," and in case of partially included districts such tax shall be equitably apportioned upon the several parts thereof.

Sec. 8. Anything in the constitution of this state in conflict or inconsistent with the provisions of this amendment is hereby declared to be inapplicable to the matters and things by this amendment covered and provided for.

(Additional article as proposed by L. '01, p. 97. Adopted November 4, 1902.)

ARTICLE XI, SECTION 8, OF THE CONSTITUTION OF COLORADO.

No city or town shall contract any debt by loan in any form, except by means of an ordinance, which shall be irrepealable, until the indebtedness therein provided for shall have been fully paid or discharged; specifying the purposes to which the funds to be raised shall be applied, and providing for the levy of a tax, not exceeding twelve (12) mills on each dollar of valuation of taxable property within such city or town, sufficient to pay the annual interest and extinguish the principal of such debt within fifteen, but not less than ten years from the creation thereof; and such tax when collected shall be applied only to the purposes in such ordinance specified, until the indebtedness shall be paid or discharged. But no such debt shall be created unless the question of incurring the same shall at a regular election for councilmen, aldermen or officers of such city or town, be submitted to a vote of such qualified electors thereof as shall, in the year next preceding, have paid a property tax therein, and a majority of those voting on the question, by ballot deposited in a separate ballot-box, shall vote in favor of creating such debt; but the aggregate amount of debt so created, together with the debt existing at the time of such election, shall not at any time ex-

ceed three per cent. of the valuation last aforesaid. *Debts contracted for supplying water to such city or town are excepted from the operation of this section.* The valuation in this section mentioned shall be in all cases that of the assessment next preceding the last assessment before the adoption of such ordinance. (italics ours.)

1 Mills' Ann. Stat., p. 333.

Supreme Court, U. S.
FILED.
OCT 25 1912
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 642.

THE CITY AND COUNTY OF DENVER ET AL.,
PETITIONERS,

vs.

THE NEW YORK TRUST COMPANY ET AL.,
RESPONDENTS.

No. 643.

THE CITY AND COUNTY OF DENVER ET AL.,
PETITIONERS,

vs.

THE DENVER UNION WATER COMPANY ET AL.,
RESPONDENTS.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

REPLY BRIEF OF PETITIONERS.

WM. H. BRYANT,
Attorney for the City and County of Denver.
CHARLES W. WATERMAN,
Solicitor for Petitioners.

WM. P. MALBURN,
WILLIAM A. JACKSON,
Of Counsel.

SUBJECT-INDEX.

	Page
Admissions in Pleadings and Briefs	2
Admission City may build its own plant	11
Bill is too broad	76
Breach of contract no impairment	79
Contract:	
Circumstances surrounding its making	23
Construction of all its provisions	28
Construction of Sections 11 and 12	36
Contemporaneous construction	57
Impairment of	65
Validity of, to renew franchise	40
Court of Appeals decision	60
Cross-bill	67
Cross-bill cannot alone give jurisdiction	81
City may build two water plants	77
Jurisdiction of court	42
Obligation to purchase	63
Street rights, so called	16

TABLE OF CASES.

Archer *vs.* American Water Co., 50 N. J. Eq., 33	27
Blair *vs.* Chicago, 201 U. S., 400	19
Clark *vs.* Los Angeles, 116 Pac. Rep. 722	75
Curtis *vs.* Whitney, 13 Wall., 68	79
City of Leadville *vs.* Sewer Co., 47 Colo., 118	19
Columbus *vs.* Mercantile Trust Co., 218 U. S., 645	70
Calder *vs.* Michigan, 218 U. S., 591	3
Clay Center *vs.* Clay Center Co., 78 Kan., 390	15
Dawson *vs.* Columbia Trust Co., 197 U. S., 178	67
Edwards *vs.* D. & R. G. R'd Co., 13 Colo., 519	15
Elyria Gas Co. *vs.* Elyria, 57 Oh. St., 374	77
Farmers L. & T. Co. *vs.* Sioux Falls, 131 Fed., 890; 136 Fed., 721	69
Heller *vs.* People, 2 Colo. App., 459	15
Janeway *vs.* Duluth, 15 Minn., 292	77
Londoner *vs.* City of Denver, 179 Pac. Rep., 156	15
Lewis *vs.* Water Co., 19 Colo., 236	32
McPhee *et al. vs.* Union Pacific, 158 Fed., 5	22
Omaha Elec. Co. *vs.* Omaha, 179 Fed. Rep., 455	19
People *vs.* Cassidy, 50 Colo., 503	15

	Page
People *vs.* Briggs, 50 N. Y., 994	15
Phœnix Water Co. *vs.* Phœnix, 9 Ariz., 430	77
Phœnix Water Co. *vs.* Phœnix, 204 U. S., 674	78
Rochester Railway Co. *vs.* Rochester, 205 U. S., 236	18
Rice *vs* Colorado Smelting Co., 28 Colo., 519	15
State *vs.* Replinger, 30 Wash., 280	15
St. Paul Gaslight Co. *vs.* St. Paul, 181 U. S., 142	67
Thomas *vs.* Grand Junction, 13 Colo. App., 80	75
Trozo *vs.* People, 51 Colo., 323	15
Turnpike Co. *vs.* Illinois, 96 U. S., 63	19
Virginia Cañon Toll Co. *vs.* People, 22 Colo., 429	18, 19, 41
Venner *vs.* Denver Union Water Co., 15 Colo. App., 495	27
Venner *vs.* Denver Union Water Co., 40 Colo., 213	2
Venner *vs.* Denver Union Water Co., 219 U. S., 583	26
Water Works Co. *vs.* Farmers L. & T. Co., 20 Colo., 203	27
Wood *vs.* Water Works Co., 20 Colo., 253	27
Walla Walla *vs.* Walla Walla Co., 172 U. S., 1	54

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REPLY BRIEF OF PETITIONERS.

Some six hundred and thirty pages of briefs have been served upon us in this case. One hundred and seventy-five authorities are cited in the one brief and four hundred and

twenty-eight in the other, a total of six hundred and three. Such stupendous efforts denote extreme care and caution upon the part of counsel or else a hope that a weak case may be concealed beneath a multitude of words and authorities. We believe the latter condition is the true one.

We believe we can demonstrate in a few words, by the admissions of counsel themselves both in their pleadings and in their printed briefs, that the original bill and the cross-bill should both be dismissed. We will first call attention to a few general matters of this kind and then take up a little more in detail some of the things found in the briefs.

I.

Admissions in Pleadings and Briefs.

It is charged in section 19 of the original bill, found on page 25 of the record, that the water company itself has in substance elected to regard the action of the city in the various matters set out *as an election to renew the contract,* and has waived its right to insist upon a purchase of its plant and has concluded that it is for the best interests of the company not to prosecute a suit for the purpose of securing a decree of specific performance compelling the city to buy the plant, but has elected to pursue as the only remedy the right of the company to compel the city to give a new franchise. And this averment of the bill is expressly admitted in the answer filed by the water company (Transcript of the Record, page 92). We submit that this allegation in the bill and its admission by the answer puts an end to the right of the trust company to maintain its bill. The water company is the owner of the plant, the owner of the franchise, and has simply executed a mortgage to the trust company as trustee. There is no averment that any of the conditions of the mortgage have ever been broken. The mortgagor has remained in possession and promptly paid the interest up to the time of the filing of the bill. Under

these circumstances it is for the mortgagor to say what remedies it will pursue for the purpose of protecting its own property. If it has two remedies and deliberately makes its election to pursue one of them, it does not lie in the power of the mortgagee to come into court and say that it will pursue the other. We contend that this is a deliberate election upon the part of the real party in interest, and that, like any other election of remedies, it is final and conclusive. As stated by this court under similar circumstances:

> "We may add that it is a matter upon which the bondholders have nothing to say." Calder *vs.* Michigan, 218 U. S., 591, 600.

We might add in passing that this case is conclusive of many of the issues raised in the case at bar, and we commend it to the careful consideration of the court. But it is too fundamental a proposition to need argument that the mortgagor has the right to deal with his property and the right to adopt any choice of remedies in relation to an injury to that property, and that the mortgagee cannot come in and attempt to set aside any action or any election taken by the mortgagor. We submit, therefore, that upon this solemn admission of record the complainant has no standing in this court.

Aside from this there are other solemn admissions found in the briefs that are conclusive, not only of the complainant, but of the cross-complainant. It is stated in the brief of the trust company, at page 159, that at the time the city council passed ordinance 163 of 1907 there was no charter provision of Denver to the effect that the city might not elect to purchase the water plant without submitting the question to a vote of the electors. And in the brief of the water company the same thing is stated in numerous places. We call attention, for instance, to one of those bland assumptions running all through the brief, found upon pages 104 and 105, that the right of choice under the contract

originally provided always remained with the mayor and council, because the contract of 1890 gave *to the council, and no one else,* the exclusive right of determining whether the city would purchase or renew. Nothing like or akin to this can be found in the contract, or can be in any manner deduced from any principle of law. The words council, city council or mayor are not even used in the ordinance. Section 11 of the contract says that THE CITY, *at its election,* may purchase the plant. Section 12 says that THE CITY, *at its election,* may renew the contract if it sees fit. Indeed, as we shall show in a moment, counsel themselves, both in their pleadings and brief, urge that it was the city as a whole that had the right to determine whether or not it would build a municipal plant, and that it was the taxpaying electors that had the right to determine whether a new franchise would be granted. Surely it cannot be contended that the water company had a vested right in a city council and a mayor in the city of Denver, or that the contract of 1890 gave them a vested right to have the city governed for all time by a mayor and a city council who alone should represent the city in making the elections provided for by sections 11 and 12. It is too fundamental a proposition to require argument that the State, notwithstanding the ordinance of April 10, 1890, had the right to change the form of government of the city of Denver in any way that it saw fit and to provide whatever method was deemed advisable for permitting the city to decide whether it would embark upon the dangerous seas of municipal ownership, or whether it would grant a franchise to any corporation. It, of course, could not authorize the city to repudiate or impair its contract, but it could name the agencies by which the contract should be carried out. The adoption of the 20th article of the constitution of Colorado did change the agencies by which the city of Denver was governed. It gave to the city a unique form of government, but at the same time one entirely satisfactory to the city

and the State. So unique was the form of government that counsel has even contended that it denied the people of Denver a republican form of government. But, however that may be, it has been sustained by the Supreme Court of Colorado in its entirety, and is binding upon the Federal tribunals.

Under the provisions of article 20 of the constitution a charter governing the people of the city and county of Denver was adopted. Article 9 of that charter states how the city may express its determination to enter upon the question of municipal ownership. That charter was adopted in 1904. It was in full force and effect when ordinance 163 of 1907 was adopted. It is claimed by the complainant that 163 was an election to purchase. It is claimed by the cross-complainant that it was an election to renew the contract. We submit that it could be neither, because it was a mere ordinance passed by the city council that had no more authority to determine whether the city should embark upon municipal ownership, or to determine whether or not a franchise should be granted, than this court had a right to determine that question. By the charter both of these matters are carefully regulated and the power is expressly taken from the council to pass upon it. Nay, more, by the constitution of Colorado itself, a franchise for any purpose can only be granted by the tax-paying electors, and any person applying for a franchise has the absolute right to submit the franchise in the form he desires it, and by putting up the expense of the election, have the electors vote upon it.

Counsel in this case have expressly recognized this condition of affairs by pleading in section 16 in the cross-bill, beginning at page 133 of the record, that section 264-A was passed in direct violation of article 9 of the charter. Of course this pleading of itself is an absurdity, because section 264-A was an amendment of the charter itself. But we call attention to this fact to show the importance attached, even by counsel, to the provisions of article 9. But they have

stated the case so clearly in their brief that we will conclude this portion of the argument with the following quotation from the brief of counsel for the cross-complainant, beginning on page 259:

> "The subject of the acquiring of a public utility was given the most careful consideration, and both the city and its tax-payers guarded against the hasty and improvident action of those in authority, and the company whose property it was proposed to acquire was likewise to be protected by a proceeding which required the due ascertainment of the value of its property. The object, then, of article IX of the charter was twofold: to protect the company and to protect the public utility.
>
> "To ignore these provisions as to the water company would, as we shall later demonstrate, violate the Federal Constitution, and to fail to follow these provisions, so far as the city, its inhabitants and its taxpayers were concerned, was to proceed in an otherwise illegal manner, which could be checked by any one having the requisite interest, and whose property or business was being irremediably damaged. The water company, therefore, has the right to protest the validity of section 264-A upon both of the above grounds.
>
> "Article IX of the charter, as alleged in paragraph sixteenth of the cross-bill, required the following conditions precedent to the acquirement of a water plant.
>
> "First. A petition signed by qualified electors, in number not less than 25 per cent, requesting such acquisition.
>
> "Second. The presentation of the same to the city council.
>
> "Third. The direction by the city council to the board of public works to investigate the advisability of such acquisition, and all costs and expenses which would be incurred thereby.
>
> "Fourth. The passage of an ordinance by the council providing for the expense of such investigation.
>
> "Fifth. A careful investigation by the board of public works as to the following matters:

"(*a*) Whether and how such public utility may be acquired.

"(*b*) At what probable cost, and the preparation by the board of preliminary specifications for that purpose.

"(*c*) Whether, if required, it can be operated by the city at a profit or advantage.

"Sixth. A report by the board of public works, after such investigation, to the mayor and council; its findings in the premises, together with all the facts upon which such findings are based.

"Seventh. If such report be specific in the points mentioned above, and favorable in its character, the opinion of the city attorney upon the legal questions involved must be obtained.

"Eighth. If the city attorney's opinion be favorable, the mayor must endorse his concurrence or nonconcurrence upon the same.

"Ninth. With such endorsement it shall be returned to the board of public works, which shall make final estimates, with full specifications, plans and details, and shall prepare and recommend to the council a bill for an ordinance, which must be specific in its character as to the description of the utility, the total maximum estimated cost, the manner in which it is to be acquired, the maximum amount of bonds to be issued, the time when such bonds shall mature, and the rate of interest thereon; and which shall provide for the acquisition of the public utility in the manner so stated, and at not to exceed the total maximum cost therein mentioned, and not otherwise.

"Tenth. Action by the council thereon.

"Eleventh. If the council's action be favorable submission to vote of the people of the question of issuing the necessary bonds.

"No attempt whatever was made by the city to comply with these provisions prior to or at the time of the supposed adoption of section 264-A."

The summary given by counsel of the provisions of article 9 are so complete that we will not take up the time of the court by repeating the charter provisions at this point,

but we append the same as an appendix to this brief so that the court may see exactly what they are. These provisions state how the city may determine the question of municipal ownership. An election to purchase a plant under an option does not differ from any other method of acquiring public utilities, except in detail. Before, therefore, the city could exercise the option given by the contract of 1890, these provisions so lucidly explained by counsel must have been complied with. There is no pretense that they ever were complied with, so that the argument that the city had elected to purchase is unquestionably disposed of by counsel themselves.

On the other hand, counsel for cross-complainant contends that the city had elected to renew the franchise. Whatever else may be said, a renewal of a franchise is nothing more or less than the granting of a franchise. The constitution of Colorado contains the following clause:

> "No franchise relating to any street, alley, or public place of the said city and county shall be granted except upon the vote of the qualified tax-paying electors, and the question of its being granted shall be submitted to such vote upon deposit with the treasurer of the expense, to be determined by said treasurer, of such submission, by the applicant for said franchise." Article 20, constitution of Colorado."

This provision is also found, word for word, in the charter of the city and county of Denver. The only way that the city can grant a renewal of the franchise, or a new franchise, to the Denver Union Water Company would be by complying with this constitutional provision. It will be noted that article 9 virtually leaves the question of whether or not the city shall embark upon municipal ownership to the tax-paying electors. So that the constitution of Colorado and the charter of Denver provide the agency by which the various options given in the contract of 1890 may be ex-

ercised, and the authorities of the city and county of Denver to determine it are the tax-paying electors. There is no allegation in the bill or in the cross-bill, and no proof submitted, that the tax-paying electors have ever agreed to purchase the plant or renew the contract. Unless, therefore, counsel have been able to demonstrate as a proposition of law that by lapse of time, or automatically under settled rules of law, the city has renewed the franchise or elected to purchase, both the bill and the cross-bill must fail. But the Court of Appeals held that the city, without any fault of its own, had not yet passed upon either of these questions. This finding of the court is, we think, beyond dispute, unless it be that the tax-paying electors have voted upon the proposition to renew the franchise and have expressly rejected that question.

This brings us to a consideration of how the question of renewing the franchise is to be submitted to the voters of Denver. There is no provision in the charter of Denver permitting the council, of its own motion, to submit a franchise. The only authority that can submit a franchise is that of the person desiring the franchise, who must submit it and pay for the cost of the election. Acting under this provision the water company did submit a new franchise, which was voted on in May, 1910. This franchise was prepared before the 10th of April, as it appears from the exhibit introduced in the record and found opposite page 282 that on the 31st of March, 1910, the company issued a circular stating that their franchise had been prepared, that they had secured the requisite number of signatures, and that it had been filed with the city council. We submit that this was the only way known of securing an expression of opinion of the people upon the proposition of whether the franchise would be renewed. The proposed franchise contained a table of rates and was in effect a renewal of the old franchise, and was expressly repudiated by the people. We submit that this was an election by the city not to renew the

franchise, and as the water company had already elected to abandon its remedy for a sale of its plant, and the city had refused its option to renew the franchise, we submit that no remedy exists of any kind or description on behalf of the water company against the city, and that both the bill and the cross-bill for these reasons, if for no other, are entirely without equity.

In taking up some other questions suggested by the brief we will call attention to the fact, which is also urged by counsel, that this case is *sui generis*. Practically the same arguments were made in the court below and the same authorities cited that are set out in the two briefs now on file. But of the six hundred authorities called to the attention of the Court of Appeals, that court cited not one. In other words, it could find not a single case called to its attention to justify its opinion. An examination of the opinion discloses that the court cites but two cases, one on a question of jurisdiction, and the other simply a decision of the Supreme Court of Colorado that had held clause 5 of the ordinance of 1890 unenforceable. This was simply referred to as a matter of fact, and not cited as an authority. Nor does the Court of Appeals attempt to follow or sustain for a moment a single line of reasoning suggested in the briefs of counsel for the respondents. On the contrary, wherever any of their pet theories are referred to it is to overthrow them. The court expressly repudiates both the contention of the complainant and of the cross-complainant, by saying that the city has neither elected to purchase nor elected to renew. It says that the city has done neither, and states its position to be that it does not propose to do either. And we simply desire to say that this statement of the Court of Appeals is entirely correct. The court, however, does hold that sections 11 and 12 were intended to mean, whether they say so or not, that the city must elect to purchase or to renew, that it is compelled to take one or the other alternative. A careful examination of the opinion shows that the court does

not reach this result from the language of the contract, but rather from what it believes was the intention of the parties.

The court further holds that section 264-A of the charter impairs the obligation of the contract when it authorizes the city to build a competing plant. We ask this court to compare the opinion of the Court of Appeals found upon page 336 of the record with the opinion of Judge Lewis, beginning on page 318. It is also curious to note that Judge Lewis does not cite in his opinion any of the six hundred and odd cases cited in the brief filed in this case, except 213 U. S., upon the question of jurisdiction, and a reference to the Dartmouth College case and Ogden *vs.* Saunders, upon the proposition that the initiative and referendum doctrine is opposed to our Constitution as it was prepared by the fathers. Judge Lewis rests the right to the injunction upon entirely separate and distinct grounds to those given by the Court of Appeals. That is to say, counsel have forty or fifty different opinions expressed in their briefs, the Court of Appeals has another opinion, and Judge Lewis has another opinion. All of which, we think, goes to show that none of them are right, but that the simple meaning of the contract should govern and that all that is needed is a simple reading of it to show that all these conclusions are wrong.

II.

Admissions as to Power of the City to Build its Own Plant.

It seems to us that the express admissions made time and again in both the briefs of the complainants and the cross-complainants end this litigation. It is expressly stated that no attempt is made to deny to the city the right to build its own plant. We are at a loss to conceive, therefore, upon what ground the court below enjoins the city from doing this very thing. Section 264-A of the charter author-

izes the city to construct its own plant. Counsel say that this can be done if it is done lawfully. They then say that section 264-A was not passed properly and that three-fifths of it relates to an attempt to buy the plant and only two-fifths to the building of the plant by the city. Conceding all this, how does that prevent the city from building its own plant? Summed up, the amendment says that the city offers the Denver Union Water Company seven million dollars for its plant, and that if this offer is refused the city shall proceed to build its own plant. Suppose the offer of seven million dollars constitutes nine-tenths of the amendment. Is anybody injured, or does it detract from the remaining one-tenth? Would we be in any better shape if the offer of seven million dollars was contained in one-tenth and nine-tenths related to building the municipal plant? In other words, is the validity or invalidity of the amendment to be determined by the exact proportions contained in the offer to the water company and in those provisions relating to the municipal plant? It certainly makes no difference what the contract of 1890 was, or what any other contract was. The city had a perfect right to offer the water company any sum it saw fit for its plant, and the water company had a right to reject this offer. The mere fact that it is contained in a charter amendment cannot by any possibility that we can see affect the legal result. The city has done the same thing by other charter amendments and nobody has been heard to complain. For instance, in 1906, section 262-A was adopted, which was as follows:

> "SECTION 262-A. The mayor and council of the city and county of Denver are hereby directed to enter into a contract for street arc lamps, at the rate of sixty dollars ($60.00) per year, for the period of ten (10) years, with The Denver Gas & Electric Company, and to authorize The Denver Gas & Electric Company to purchase the property of The Lacombe Electric Company, discharged of any option

of the city and county of Denver to purchase the same; *Provided*, That said The Denver Gas & Electric Company procures a release from The Lacombe Electric Company of the contract with the city and county of Denver to pay ninety dollars ($90.00) per year for arc lights."

This section gave up an option which the city had on the plant of the Lacombe Electric Light Company.

It seems to us an absurdity to say that this mere offer of seven million dollars found in section 264-A was an unconscionable act on the part of the city. It had a perfect right to offer any sum that it saw fit. We might say in passing that the reasons which actuated the city in making this offer are fully set forth in the record of this case and show the injustice of the fourteen million four hundred thousand dollar appraisement, and the actual value of the water plant. We might go further and say that, in our opinion, the action of the lower court in this case was based upon the unwarranted assertions found in the bill and reiterated by counsel that the water company had a plant worth fourteen million dollars which the city was attempting to depreciate and acquire for seven million dollars.

The water company itself has offered in evidence the report of the Public Utilities Commission which is found beginning on page 216 of the record. It is needless to say that this commission is composed of men of the highest integrity and standing in the city of Denver. Judge Van Cise is a lawyer, a man of fine ability, and now a candidate for justice of the Supreme Court of the State of Colorado. A. Lincoln Fellows is an engineer of international reputation and for many years one of the trusted engineers of the United States Reclamation Service. Mr. Anderson is a man of sterling integrity, of the city of Denver. These gentlemen employed an expert, Mr. Hiram Phillips, formerly president of the Board of Public Improvements of St. Louis, Missouri, to give them a statement as to the value of the

property of the company, and all this is set forth in detail in the report. Against it we have nothing but the sworn statement in the bill of the company that certain appraisers had found the plant to be worth fourteen million four hundred thousand dollars.

As a sample of the way in which these valuations are arrived at and also the value of this franchise irrespective of any questions of renewal or purchase, it is stated that one million two hundred thousand dollars, which is included in the fourteen million four hundred thousand dollars, is the value of the business from the time of the report to the end of the franchise, or April 10, 1910, something over a year and a half. The purchase was to be made as of date of April 10th. So that the city is asked to pay one million two hundred thousand dollars, the value of the franchise, at a time when the franchise had expired. We only give this as a sample of the so-called valuation placed upon this plant, and to show the justice and equity of the position of the city with reference to its valuation.

But going back to our other proposition, when counsel admits that the city has a right to build its own plant, we confess that all of the reasoning in both briefs falls to the ground. The only real relief is an injunction against building the plant. The other matters are questions of the enforcement of contracts which the city might be compelled to do, but which could not interfere with its right to build its own plant. We might in this connection call attention to the page after page of the argument that section 264-A is void because it was passed contrary to the provisions of the Constitution of Colorado in that it submitted various propositions which should have been voted upon separately, that it is a new charter, and many other equally startling propositions. We may say in regard to all this that in our opinion this court is concluded by the uniform action of the legislature and the uniform decisions of the Supreme Court of Colorado upon this subject. Under article 20 of the Con-

stitution the people of Denver are given the power to make, amend, change or alter their charter. It can be done by a charter convention or by amendment to the existing charter. It has been held by the Supreme Court that the people have all the powers of the legislature with reference to the Constitution. People *vs.* Cassidy, 50 Colo., 503; Londoner *vs.* the City and County of Denver, 179 Pac. Rep., 156, 159.

It has been uniformly held that the legislature, even under a constitutional restriction providing that only one subject can be treated in a bill, has the right, in amending a municipal charter, to amend as many sections as it sees fit, and that the general subject of municipal government and all departments of it are included under the heading of an act relating to municipal corporations. The Colorado cases are uniform upon this subject. For instance, it is held that:

> "The title of the act of 1879 is 'An act to amend an act entitled an act in relation to municipal corporations,' approved April 4, 1877. Under this title any matter pertaining to municipal corporations may be included."
>
> Rice *vs.* Colorado Smelting Co., 28 Colo., 519.
> Edwards *vs.* D. & R. G. Railroad Co., 13 Colo., 519.
> Trozo *vs.* People, 51 Colo., 323, 325.
> Heller *vs.* People, 2 Colo. App., 459.

The same rule has been announced in other states. State *vs.* Replinger, 30 Washington, 280; People *vs.* Briggs, 50 New York, 994.

Many other cases might be cited, but these are all on the proposition that if this was an act of the legislature, a title to the amendment to the effect that it was an act to amend the charter of the city of Denver would be sufficient to cover anything that the legislature might see fit to include concerning the city of Denver. The people have just as much power as the legislature and can pass a similar act. The de-

cision in the Hays case (28 Colo., 110) has nothing to do with a charter amendment of this kind.

Time and again the legislature amended the charter of Denver—even granted new charters simply under a title "To amend the charter of the city of Denver."

See Session Laws of Colorado 1883, page 53.
Session Laws 1885, page 74.

But the proposition is too plain for further argument.

III.

So-called Street Rights.

We must earnestly caution the court to beware of many so-called statements of facts and reiterated assumptions of law found time and again in the briefs and especially in that of the water company. Propositions of law and fact are assumed with an air of innocence that seems and may be child-like, but have no more basis to stand on than most dreams of childhood. For instance, claim is made of contracts entered into in 1870 and 1874 granting certain *street rights* that were without time limit, and that these rights continued unaffected by the ordinance of 1890. As a matter of fact, neither the contract of 1870 or of 1874 mentioned streets or consisted of anything more than the grant of an ordinary franchise. Both contracts are in strange contrast with the ordinance of 1890. To illustrate, we place in parallel columns the granting clause of each:

1870.	1890.
"Doth hereby grant unto the said party of the second part the sole and exclusive right to lay pipes for the distribution of water *within the city limits of said city of Denver* and any additions that may hereafter be made thereto." Transcript, page 194.	"The right and privilege of laying down, continuing and maintaining water pipes, valves, hydrants and apparatus for the conveyance and distribution of water *in, upon, along and through the following streets, avenues, alleys and public places of the city of Denver and additions thereto to-wit:* * * * is hereby granted to The Denver Water Company, its successors and assigns, *to such extent as the city may lawfully grant the same.*" Transcript, page 31.

(The italics are ours.) This shows the first grant never mentions these *so-called* street rights that are harped on so continuously. And yet a reading of the brief would lead one to believe that this was the main thing granted in 1870 and in such terms that they endured forever. At least one-fourth of the water company's brief is based on this continued and repeated misstatement.

The grant of 1874 was word for word the same as 1870, except it expressly limited the time to seventeen years. The granting clause is as follows:

> "Doth hereby grant unto the party of the second part the sole and exclusive right to lay pipes for the distribution of water *within the city limits of the said city of Denver* and any additions that may hereafter be made thereto for the period of seventeen years from the date of this agreement."

No right to lay pipes in the streets at all is mentioned and only arises by implication. It is simply the ordinary franchise permitting the company to do business for seven-

teen years. All prior contracts are expressly cancelled. No successors or assigns are mentioned in this or the grant of 1870. It is to the Denver City Water Company alone that the grant is made. The original company was succeeded by one or more companies prior to 1890, and it is extremely doubtful whether in 1890 the Denver Water Company had any title whatever to this franchise of 1874.

Rochester Railway Co. *vs.* Rochester, 205 U. S., 236.
Virginia Cañon Toll Co. *vs.* People, 22 Colo., 429.

As a matter of fact, the grants of 1870 and 1874 were both ordinary franchises, and under the settled law of this court, the courts of Colorado and the Circuit Court of Appeals could not exist for a longer period than twenty years, even at that time.

Colorado at that time was a Territory and governed by acts of Congress. In 1867 Congress passed an act providing, among other things,

> "That the legislative assemblies of the several territories of the United States shall not, after the passage of this act, grant private charters or especial privileges."
>
> 14 Statutes at Large, 426.

This is substantially the provision embodied in the Constitution of Colorado in article 2, section 11:

> "No law making any irrevocable grant of special privileges, franchises or immunities shall be passed."

The territorial act is even stronger than the Constitution, as it prohibits any special privileges, while the Constitution only prohibits irrevocable special privileges. So the city attorney in 1874 was undoubtedly right when he advised the council that this grant of 1870 was void (Transcript, page 206).

But again, the territorial legislature, providing for corporations, limited their life to terms of years varying from

twenty to fifty. As no provision was made for water companies beyond that of ordinary companies, they were limited to twenty years.

Revised Statutes of Colorado (1868), 117, 143.

The grants of 1870 and 1874 contained no clause as to successors or assigns, but were limited to the water company itself. As no time was mentioned, it is settled law that the grant certainly expired when the corporation ceased to exist.

Virginia Cañon Toll Co. *vs.* People, 22 Colo., 429, 433.

City of Leadville *vs.* Sewer Co., 47 Colo., 118, 130.

Omaha Electric Light & Power Co. *vs.* Omaha, 179 Fed. Rep., 455, 460.

Turnpike Company *vs.* Illinois, 96 U. S., 63.

Blair *vs.* Chicago, 201 U. S., 400.

At that time no provision was even made for renewing a corporation when its charter expired, but it was expressly provided that its business should be wound up and its assets distributed among the existing stockholders. And in the Virginia Cañon Toll Road case, *supra*, the Supreme Court of Colorado even held that a corporation could not in its lifetime transfer such a grant to another corporation or a natural person so as to give it any life beyond the twenty years.

So that all the talk about perpetual "street rights" amounts to nothing. The same argument was made to the Circuit Court of Appeals, but that court disposed of it in very few words:

> "The water company with its contract and franchise expired *and no right to continue the use of the streets* would, as a practical proposition, be compelled to agree upon a price if the city was willing to buy. Without the validity which comes from a franchise its property, designed for a special use, would have little value."
>
> **Transcript, page 340.**

Equally confusing and misleading is the attempt to divide a grant or franchise into two parts—(*a*) street rights, (*b*) and a contract to furnish water. The whole thing is a grant, a franchise, a privilege, or whatever it may be termed, and also constitutes a contract. And above all it is the "street right," as it is termed, that is the franchise and subject to all the limitations imposed by statutes and implied by courts. This same Circuit Court of Appeals in another case has clearly stated the distinction between a franchise and a mere license. As the opinion quotes both from this court and the Supreme Court of Colorado, we give the following excerpt:

> "A franchise is a right or privilege granted by the sovereignty to one or more parties to do some act or acts which they could not perform without this grant from the sovereign power. Bank of Augusta *vs.* Earle, 13 Pet., 595, 10 L. ed., 274; D. & S. Ry. Co. *vs.* Denver City Ry. Co., 2 Colo., 673, 682. Familiar illustrations are the right to be a corporation, to hold property, to sue and be sued as such, the right to build a bridge or to operate a ferry over a public stream and to collect tolls therefor, the right to construct and operate on and in the streets of a city a street railway, waterworks, gasworks, electric light works, to supply the city and its inhabitants with transportation, water, gas, and electric lights, respectively, and to take tolls therefor. In this country the title of every lawful franchise is deraigned from the nation or the state, and the city of Denver had no power to grant any franchise which the constitution and the laws of the State of Colorado had not authorized it to give.
>
> "It is not, however, every privilege or permission granted by state or city to occupy or to use public rivers, highways, or streets that rises to the dignity of a franchise. A privilege granted by a city to a private party to occupy or use a portion of a public street temporarily for the construction of a building upon an abutting lot, for a cab stand, an apple stand, or for any similar commercial purpose is a license and not a franchise. The exact line of demarcation between franchises and licenses may not be clearly drawn, but their general characters and limits are so well known and so clearly established that it is not

difficult to assign many rights granted to the class to which they belong. * * *

"The next argument in support of the position of the appellants is that, by the legislation of the State and by the decisions of the Supreme Court of the United States and of the Supreme Court of Colorado, the settled meaning of the word 'franchise' had come to include a revocable permission granted to an ordinary railroad company to lay its tracks and operate its railroad across, or for a short distance upon, a street in a city, before article 20 was framed or adopted, and they cite Sess. Laws Colo., 1889, p. 12; §12, Sess. Laws, 1893, p. 141, c. 78; §10, Sess. Laws, 1903, p. 158, c. 78; §1, Sess. Laws, 1891, p. 390, §1, and the authorities from the Supreme Courts of the United States and of Colorado, which will be next considered. This legislation, these authorities, and many others have been carefully examined in vain to find any declaration of the legislature of Colorado, or any decision of any court, to this effect. The grants called 'franchises,' in the opinions cited by appellants' counsel, were grants to public utility corporations of general rights to use the streets to provide the people of the municipalities with such utilities and to take tolls therefor. Not one of them applies that term to the mere consent of a city to the laying by an ordinary railroad company, incorporated by the State, of its tracks and the operation of its railroad over short parts of the streets of a municipality.

"In New Orleans Gas. Co. *vs.* Louisiana Light Co., 115 U. S., 650, 659; 6 Sup. Ct., 252; 29 L. ed., 516, the grant which the Supreme Court considered was of the exclusive right to supply gas to the city of New Orleans and its inhabitants through pipes and mains laid in its streets on condition that the grantee company should render the service ordinarily required of such corporations, and it was of this right that the Supreme Court said:

" 'The right to dig up the streets or other public ways of New Orleans and place therein pipes and mains for the distribution of gas for public and private use is a franchise, the privilege of exercising which could only be granted by the State or by the municipal government of that city acting under legislative authority.'

"In Walla Walla *vs.* Walla Walla Water Co., 172 U. S., 1, 9, 19 Sup. Ct., 77; 43 L. Ed., 341, the Supreme Court was considering the grant to a corporation of the right to lay and to maintain and operate in the streets of a city, for 20 years, water mains and pipes to supply the city and its inhabitants with water and to take tolls therefor, in consideration that the corporation rendered the public service commonly performed by such water companies; and the court remarked that the grant of such a right was the grant of a franchise, and that after the performance of the service it was a contract.

"In Denver *vs.* City Cable Ry. Co., 22 Colo., 565, 45 Pac., 439, the right which the Supreme Court of that State termed a 'franchise' was the general right granted by the city of Denver pursuant to legislative authority, to a street railway company to lay its tracks and to transport passengers on the streets of Denver and to take tolls for the carriage.

"In Donahue *vs.* Morgan, 24 Colo., 389, 400, 50 Pac., 1038, the franchise of which the court spoke was the right granted by the city of South Pueblo to a private corporation to lay and to maintain, for 20 years, in the streets of that city water mains and pipes, and to supply the city and its inhabitants with water and to take tolls therefor.

"In Thomas *vs.* Grand Junction, 13 Colo. App., 80, 81, 65 Pac., 665, the right which the court termed a 'franchise' was the general right to construct and operate for 21 years a system of waterworks to supply the city and its inhabitants with water and to take tolls therefor, and to lay and maintain mains and pipes in the streets of the city for this purpose.

"In City of Denver *vs.* Denver Union Water Co. (Colo.), 91 Pac., 918, 919, the franchise which the Supreme Court of Colorado was considering was the general right granted by that city to a private corporation to lay its pipes and mains in the streets of the city, to maintain them, and to supply the city and its inhabitants with water and to take tolls therefor for 20 years."

McPhee *et al. vs.* Union Pacific Ry. Co., 158 Fed. Rep., 5, 10, 14.

This demonstrates beyond controversy that the grants of 1870, 1874, and 1890 are franchises and not perpetual street rights or contracts free from limitations imposed by provisions as to franchises. A misleading reference to this identical case will be found on pages 150-152 of the brief of the water company.

Finally, as to the grants of 1870 and 1874, it is only necessary to say that no reliance upon either is mentioned or hinted at in either the original or the cross-bill. They are not even mentioned. Sole reliance is placed upon ordinance 44 of 1890, as though it were the only contract ever made between the water company and the city.

In the same connection we call attention to the construction of the contract attempted on pages 138-162 of the brief of the water company. The contract or franchise evidenced by ordinance 44 of 1890 is divided into the two parts—(*a*) street rights, and (*b*) contract for water service—and it is then argued separately that the restrictions on franchises to twenty years does not apply to either. It would be a strange doctrine, indeed, if a city were restricted in making grants to twenty years to hold that a grant may be divided into two parts, and then the limitations be held not to apply to either part, and therefore the whole is exempted. But enough time has been spent upon such attempted jugglery of words and principles as this.

IV.

Circumstances Surrounding Making of Contract of 1890.

Another series of misleading statements that even imposed upon the Court of Appeals relates to the circumstances surrounding the making of the contract of 1890. One would gather from the opposing briefs that the city of Denver in 1890 was a poor, bankrupt community, with parched tongue, begging for help from the Denver Water Company as the

only source of supply for water, one of the necessities of life. We call especial attention to statements in the brief of the water company found on pages 4 to 8, 51 to 59, and all through the brief, for that matter. Scarcely one of these statements is borne out by the facts. In 1890 rival companies were bidding for contracts and franchises from the city, and it was only a matter of choice. No question of adequate safeguards for a vast expenditure of money were thought of, but only how to obtain grants from the city. This question is wholly immaterial, but the record contains evidence to substantiate this statement. The old water company, known as the Denver Water Company, and the Denver City Water Company was headed first by James Archer and afterwards by David H. Moffat. Mr. Moffat was a director and officer all the time. In 1889, owing to internal differences, Mr. Moffat and his following withdrew and organized a rival company called The Citizens Water Company. Mr. Moffat's affidavit in the record shows he severed his relations with the old company in 1889, and the record also shows the bitter rivalry between the old and new companies, resulting in litigation, and that Mr. Moffat was president of the new company (Transcript, pages 184, 231, and 276). The new Citizens Company was given a franchise by the city, and so actively engaged in business that the old company sought an injunction, relying on its *exclusive* contract of 1874. The new company also obtained franchises in several of the adjoining towns, as Colfax, Highlands, South Denver, and Valverde, comprising a large part of the present city of Denver, as shown by the map in the record. In 1890 the franchises of the old company had but a year to run, while the new company, with all the power and prestige of the name of David H. Moffat back of it, had a new franchise for twenty years, and was doing business. There is not a syllable in the record to show that water was scarce or the city unable to build a plant of its own. As a matter of fact, it granted franchises to both companies, as appears by the record, and let them fight it out. The very day the courts refused the

old company an injunction, and held void its claim to an exclusive franchise, the council granted it the franchise known as ordinance 44 of 1890. This placed the two companies on an equality, and the fight went on for four years more, with the usual result that the city had to foot the bill. In October, 1894, there was a grand consolidation of all the water companies. The Citizens Company was the real victor, as Mr. Moffat and his friends were in control of the consolidation, which was named The Denver *Union* Water Company. Mr. Cheesman at first was president, but was succeeded by Mr. Moffat, who was president when this suit was filed. He was one of the directors and trustee for various purposes when the consolidation was made.

The details of the consolidation can be gathered from the mortgage which is attached to the bill of complaint in this case, marked Exhibit B, beginning on page 42 of the record. From this it appears The Denver Union Water Company was incorporated on October 18, 1894; the next day its directors met and passed the necessary resolutions, and the succeeding day, October 20, the mortgage was executed. The days, weeks, or months needed to get all the warring elements together of course are not stated in the mortgage, but can readily be imagined. The mortgage recites that The Denver Union Water Company has purchased all of the property and works formerly owned by The Denver Water Company, The Denver City Water Works Company, The American Water Works Company, and The Citizens Water Company. All of these companies had been operating, had works of their own, *and had duplicated and even triplicated pipes, mains, and works.* (See Report Public Utilities Commission, Transcript of record, page 220.)

The city, of course, paid the piper. The mortgage provided for seven millions of bonds, to be issued at once, and authorized an additional million. This, of course, included a share to all the competing companies and represented the cost of the water fight in Denver. The bondholders' committee consisted of George Coppell, Edward E. Poor, James

B. Grant, David H. Moffat, and Walter S. Cheesman, representing all factions.

We have never deemed any of these facts material, as the questions in this case are pure matters of law growing out of written instruments. But counsel in the court below harped at great length upon the so-called equities and the circumstances surrounding the making of the ordinance of 1890, and seem to have impressed that tribunal and now again seem to place their chief reliance upon them. We therefore call the real facts to the attention of the court. Only the ultimate facts are in the record. The various details, however, are matters of public knowledge and to be found in published histories of Denver and numerous judicial records and decisions, some of which have been before this court. The whole story is perhaps best told by Professor Clyde L. King, professor of economics and sociology at the University of Colorado at Boulder, and now holding a similar position with the University of Pennsylvania. He prepared with great pains a "History of the Government of Denver." As it may be too much trouble for the court to look up this work, we have set out in an appendix to this brief some extracts from that showing the history of these various water companies. Much will also be found in many judicial proceedings, some of which ultimately found their way to the highest courts of Colorado and even to this court. One was lately passed on by this court where a writ of error to the Supreme Court of Colorado was dismissed for want of jurisdiction.

Venner *vs.* Denver Union Water Co., 219 U. S., 583.

The record in that case consists of nearly four thousand pages and shows all the details with reference to the consolidation of all those companies and the motives prompting it. We would also call attention to the following decisions and the statement of facts set forth in each:

Wood *vs.* Water Works Company, 20 Colo., 253.
Water Works Company *vs.* Farmers L. & T. Co., 20 Colo., 203.
Venner *vs.* Denver Union Water Co., 15 Colo. App., 495.
Venner *vs.* Denver Union Water Co., 40 Colo., 213.
Archer *vs.* American Water Works Co., 50 N. J. Eq., 33.

Enough, however, appears in the present record from the transcript of proceedings in the Supreme Court of Colorado, the affidavits of Moffat and Robinson and the report of the Public Utilities Commission to show the main facts, namely, the passing of Moffat from the old to the new company and the granting of a franchise to the new company in 1889 and the bitter rivalry between them.

It appears further, however, from the mortgage itself, that the principal property conveyed to the new company consisted of the property of *The Citizens Water Company.* (See Transcript, page 52.) It is there recited that the union company had conveyed to it property by two deeds, one by The Citizens Company and the other by Wm. A. Underwood. Mr. Underwood probably had title to whatever was owned by the old water company, including ordinance 44. But it was included in the odd lot of junk that Mr. Underwood had collected with the other companies.

The only mention, however, of The Denver Water Company in this mortgage is where it is named in one of the opening paragraphs as one of the companies going to make up the consolidation forming The Denver *Union* Water Company. It is probable that clause 20, found on page 61 of the record, relating to the possibility of purchase by the city of part of the property of the consolidated company, refers to the property of the old company, as the date would indicate that, but this must be gathered by inference and not from any direct allegation.

These are the real circumstances surrounding this transaction and that are to be considered in construing ordinance 44. The company was asking for favors from the city and bidding against a rival that had it by the throat. Bearing this fact in mind, and also the rule that all such grants are construed most strongly against the grantee, it is easy to see that the words used in the ordinance mean exactly what they say. Each section it is expressly stated is to be construed as a separate ordinance by itself.

V.

Construction of the Contract.

The first section grants the right of way over the streets mentioned *"to such extent as the city may lawfully grant the same."* To what extent could the city lawfully grant the same? Under the express limitations of the charter for twenty years and no longer. The very first section, therefore, limited all rights to the streets named to twenty years or the period authorized by the legislature for the city. Also the water company was only organized for twenty years, and under the settled rule in Colorado, already called to the attention of the court, this would limit any such grant to this period. So that the very first section limited the rights of the grantee to twenty years.

And this construction is borne out by every subsequent section. Each places twenty years as the limit of the franchises granted whenever a term is mentioned. The court below says that this construction was practically conceded in that court. Judge Hook says:

> "According to the terms of the ordinance have the contract relations between the parties expired by lapse of time? When the ordinance was adopted, April 10, 1890, the city was without power to grant the water company an exclusive contract or one for a longer period than twenty years. It did, however,

have power under the existing law to construct and operate water works of its own, and also then to bind itself by contract to purchase the plant belonging to the water company when the franchise of the latter expired. The contract to purchase, which it was within the power of the city to make, might have been an absolute one or upon such conditions or alternatives as were mutually satisfactory. *So far there is little, if any, controversy, and it may be concluded that the franchise of the water company, as originally granted, expired April* 10, 1910, *twenty years after the adoption of the ordinance.*"

Transcript, page 338.

And yet page after page of argument and cases on estoppel, deeds, and what not are cited to show that the elements of the franchise constituting its whole go on forever, and there is no time limit. Such arguments, in our judgment, are merely trifling with the time of this great tribunal.

Section two provides that additional grants upon streets thereafter laid out shall be made from time to time. This section is clearly void, as the charter at that time expressly required all "franchises and privileges" to name the particular streets over which granted. .No one council could bind a subsequent council to grant a franchise over a newly created street, or one not expressly named in the ordinance. Such a construction of the charter would completely nullify this wholesome provision. Indeed, section twelve recognizes the nullity of section two, because it provides that the city can only exercise its option to renew the contract on condition that it has complied with section two. That means that unless the company has been given franchises from time to time over new streets, as might be lawfully done, the city cannot renew.

Sections three, four, five and six provide rates and details of furnishing water to the inhabitants of Denver. Sections seven, eight, nine and ten relate to furnishing hydrants for the city and rates to be paid for water. It is only necessary

to say that the period of twenty years is mentioned as the duration of all these rights.

Sections eleven and twelve are the two over which most of this controversy has raged. To our mind their meaning is clear and needs no construction. If they were in a contract between private persons no one would ever question their meaning. It is only because there seems to be a kind of hallucination existing in the minds of many lawyers and some courts where one party to a contract is a municipality and must act by ordinances that all ordinances have a tendency to impair contracts or disturb vested rights that any doubt has ever arisen as to the meaning of these two sections. We are satisfied, however, that this court will give them their true and obvious meaning.

Section eleven simply provides that at the end of THE period of twenty years the city may, at its election, purchase the plant of the company, and in the event of such election tells how the purchase shall be made. There is nothing complicated or unusual in this. It is the same provision as contained in the two previous franchises granted in 1870 and 1874. It reads for itself.

Section twelve simply gives to the city another option. It provides that the city may at the expiration of THE SAID PERIOD OF TWENTY YEARS, *at its election*, renew the contract for another twenty years, and so on for successive periods of twenty years. Nothing very complicated or unusual about this. Read the words as they are and their meaning is obvious. The reason for inserting this section is equally obvious. The city could not bind itself to renew the contract at the end of the twenty years because of the limitations of its powers by the legislature. But the company could bind itself for any term. As an inducement to the city to grant a present contract it agreed that the city might at the end of such contract have an option to renew at a ten per cent reduction. It needs no subtle reasoning or straining of words to see this reading of the contract or this reason for

its existence. And yet counsel find it necessary to print six hundred and thirty pages of briefs and cite over six hundred authorities to show that it means something else. The Court of Appeals in its opinion does not pretend to say that it means anything else than what we claim it means, but does say that the parties did not intend it to mean this. We submit that the only evidence of intention is to come from the words themselves. As we have shown in our original brief, this is not only what was intended, but it has been the uninterrupted construction of the language from the day it was written until this suit was filed. It is true Mr. Robinson, the manager of the company, has filed an affidavit to the effect that Mr. Underwood in 1890, then president and general counsel, advised the company when the ordinance was passed it meant the city at the end of twenty years must either buy the plant or renew the contract. If Underwood thought so at that time and assisted in the preparation of the ordinance, why did he not say this in so many words. It would have been easy enough to have made it plain. We have never known a lawyer who became so much of a man of business as to be a real man of affairs and president of industrial companies to retain much of his ability as a lawyer. Nor do we know much of Underwood's ability as a lawyer, to start with, but in this matter he is certainly no exception to the general rule.

Robinson's affidavit also contains the statement on *information and belief* that the city had always acquiesced in and agreed to this *ex parte* opinion of Underwood's. But, as shown in our original brief, there is not a single act of the city that can be shown which confirms this statement. On the contrary, this entire record, from the making of the ordinances and mortgage in 1890 and 1894 down to the filing of this bill, shows that at no time did the city do an act that showed it did not believe but what it had the absolute right to say it would or would not purchase, it would or would not renew the contract. The mortgage, South

Denver ordinances, ordinance 163 of 1907 and section 264-A all show this to be the understanding of the city. Underwood and Robinson seem the only people who believed differently, and they seem to have kept their opinion to themselves.

Sections thirteen, fourteen, fifteen, and sixteen relate to laying mains and regulations as to furnishing water.

Section seventeen is in curious contrast with one of counsel's favorite doctrines—the very foundation, in fact, of much of his argument. On page twenty of the water company's brief counsel "premises the discussion" with calling attention to what they term certain general principles. We thought from this "thundering in the index" that the court would be told an apple falls from a tree because of the law of gravitation, but find they were simply going to contend that cities were clothed with governmental and business functions. It is claimed time and again that this contract is in the exercise of the business functions of the city. But section seventeen says:

> "The said company being charged with a *public duty*, the said city shall pass such ordinances as will prohibit all unlawful interference with the operations, pollution of its water supply, trespass upon its property and unauthorized use of hydrants."

We might well, in the language of the day, exclaim "it is to laugh."

We might say in passing that the Supreme Court of Colorado has expressly decided that the passing of an ordinance granting a franchise to a water company is exercising the very highest form of governmental power.

Lewis *vs.* Water Works Company, 19 Colo., 236.

And, as shown in our original brief, beginning on page 96, this court has never recognized or paid any attention to this primary contention of counsel. And in the Knoxville

and Vicksburg cases it agrees with the Supreme Court of Colorado that contracts for water are an exercise of governmental duties if these can be distinguished from business duties. How municipalities can be clothed with anything but public duties we are at a loss to understand. This only means, however, that when a contract is made this fact must be taken into consideration in construing that contract. But the law of Colorado being settled, it is useless to mention this further.

Section eighteen provides that any disputes over the franchise shall be settled by arbitration. We are amazed that neither in the bill nor the cross-bill is there any allegation that the obligation of this provision has not been impaired.

Section nineteen provides that when accepted in writing the ordinance becomes a contract. There is, by the way, no allegation anywhere in the record that it was ever accepted in writing. It is also provided the company, by accepting the ordinance, lost no rights to occupy the streets it then possessed or of any person of which it was the assignee. Strenuous efforts are made in the brief to show that this was a distinct recognition of eternal, perpetual and everlasting rights to occupy the streets. But it is obvious as to what was referred to.

The contract of May 9, 1874, gave to one of the predecessors of the company *"the sole and exclusive right"* to lay pipes in Denver until May 1, 1891. The company also owned franchises granted to other companies to adjoining towns that were exclusive, and these towns in 1890 were parts of Denver. Ordinance 44 did not pretend to grant any exclusive rights. The company had pending in court a suit to enforce these exclusive claims against its rival The Citizens' Water Company. A temporary injunction had already been obtained tying up the hands of this rival, and a motion to dissolve this injunction was pending and undetermined. If its rival could be put out of business for at least a year it would be a great victory, perhaps a final one,

and in the year a complaisant council might further harass and annoy a company whose hands were tied by such an injunction. So this section was inserted to show that the company did not waive the rights it then possessed under the contract of 1874. A similar provision, but in a little more distinct language, is made in section ten as to the price to be paid for hydrants.

Section twenty provides that the water company shall at all times, unless the city elects to purchase the same, be considered the owner of and in possession of its works, pipes, mains and other property. Considerable stress is laid upon this section in the argument as though it meant the franchise was to continue forever unless the city bought out the company. Such a construction, to our minds, is an absurdity. It clearly means that, even though all franchises may expire, the company is still to be the owner of all its real and personal property. While it might have no right to run water through its pipes or to supply the city or its inhabitants with water because its contract had expired, it would still be the owner of the pipes, mains, hydrants and other property, although they were still in the streets of the city. So a street railroad would still be the owner of its track and cars although its franchise had expired. Being such owner, the company could dig into the streets and remove the pipe, mains and hydrants and remove its works to some more profitable field where franchises were easier to get. Such is the obvious common-sense meaning of this section.

Section twenty-one contains the provision that each section of the ordinance is to be construed as an independent contract and ordinance. This provision was evidently inserted by the company for its own protection, so that if some of the clauses should be found to be void for any reason its entire grant would not fall to the ground. Thus the Supreme Court of Colorado has, as already shown, held section five to be void, and, as stated above, section two is

undoubtedly void. The water company undoubtedly prepared this ordinance, because, as this court has frequently stated, such grants are always prepared by the grantee, it is all for the benefit of the company, and a similar provision is to be found in the proposed ordinance of renewal prepared also by the water company and submitted to the voters in May, 1910 (Transcript of Record, page 268).

But now the company seeks to repudiate the application of this provision to sections eleven and twelve and the Court of Appeals finds it necessary to repudiate it to reach its conclusion. Court and counsel contend the ordinance must be held up by its "four corners" and construed as a whole. We do not care whether it is construed as a whole or as the parties solemnly agreed it should be construed; the result is the same. The common-sense meaning of the provisions is too apparent to be construed away. But we most strenuously object to parties founding their right to get into court upon a far-fetched impairment of a contract and then, after they get in, as their very first act impairing the contract itself by saying that a section construing the whole contract in one way does not mean what it says, but the contract should be construed exactly opposite.

This, if the court please, is our construction of the contract as a whole. We submit there is no straining of words needed, no necessity for the Court of Appeals to go into the realms of the imagination to find out what it thinks the parties must have intended, but all that is required is a taking of the words in their usual and ordinary sense. Let us, however, look for a moment a little more closely at sections eleven and twelve.

VI.

Sections Eleven and Twelve of the Contract.

It is expressly conceded by counsel and substantially so by the Court of Appeals and the trial court that the city did not by this contract divest itself of its power to build its own plant at any time it saw fit. It cannot be denied that in 1890 the city had the right to build its own plant. It already had an option to purchase the plant of the Denver Water Company under the contract of 1874. It also had an option to purchase the plant of The Citizens Water Company under that franchise. So that at the time this ordinance was passed the city was in this position: It could do one of several things: (*a*) It could buy the plant of The Denver Water Company under the contract of 1874, (*b*) it could construct an entire new plant of its own, (*c*) it could buy the plant of The Citizens Water Company under its option with that company, (*d*) it could grant a new franchise to the Denver company and let that company fight it out with The Citizens Company.

The Court of Appeals never considered the position of the city at all with reference to the real situation. It went wholly upon the assumption that the city was without water and was looking for some parties to build a water plant costing an immense sum of money and engaged solely in safeguarding this investment of capital. The court in its opinion considered only the position of the company. Why not consider also the position of the city? Why not consider also the previous relations of the city and the company?

The court says it is hardly to be supposed that parties would invest sufficient capital to build a plant merely on getting a franchise for twenty years and have nothing at the end of the twenty years. Why not? The charter of the city expressly prohibited the granting of anything be-

yond the twenty years. This prohibition would be meaningless if the city authorities could evade it as the Court of Appeals says they could. Nay, more; this identical company had already, in 1870 and 1874, made two contracts with the city that left it in this identical position, and one was only for seventeen years.

The contract of 1874 ran only for seventeen years and only had a provision that the city at the end of the time could purchase if it elected so to do. As the Court of Appeals says:

> "If section eleven stood alone in the ordinance it would seem clear that the city might do as it pleased, purchase or not purchase, whatever the circumstances."
>
> Transcript, page 340.

The provision stood alone in the contract of 1874.

Nay, more; Mr. Moffat and The Citizens Company, composed of people who had previously controlled the Denver Company, had but lately taken a franchise for twenty years with no thought of anything at its end except such as the city might grant.

In addition to all this the company itself was only incorporated for twenty years and had no power of renewal, but under the laws of Colorado as they then stood must dissolve itself at that time and distribute its property among its stockholders. Section 341 of the General Statutes of Colorado of 1883 provided:

> "Upon dissolution by expiration of its charter or otherwise of any corporation * * * the board of trustees * * * shall be the trustees of the creditors and stockholders * * * to divide the residue of the moneys and property belonging to the corporation dissolved after payment of debts and the necessary and reasonable expenses among the stockholders holding stock in such corporation in proportion to the amount of stock of each stockholder paid up" (page 150).

What rights had such a company to expect beyond the period of its natural life?

Should not the court look at these considerations as well as the "liberal investment" of capital upon which the Court of Appeals lays so much stress. And if we look at them is not the plain meaning of the language used in sections 11 and 12 fully confirmed?

Section 11 says the city *may at its election* purchase at the end of the contract. Section twelve says the city *may at its election* grant a new franchise *with a reduction of* 10 *per cent in hydrant rentals* at the end of the contract.

Was it necessary to say anything more *and was it not necessary for the city to reserve both of these options to protect its own interests?* By remaining silent as to its power to build a plant of its own the city lost nothing. Even astute counsel conceded the city still had this power. But by remaining silent as to purchase and renewal the city would lose its right as to these. The Court of Appeals says the city at the end of the period would have the company at its mercy and could dictate either of these policies without such a contract and that these provisions are *redundant* (Transcript, p. 340). But is not this a begging of the question, a most false conclusion, and a far-fetched reason for making the language of the contract mean something it does not say?

Was it not more fair and honorable for the city to say if we want to buy your plant we will pay what it is reasonably worth, and if we cannot agree we will let the price be fixed by arbitrators? This is what was done in 1870 and 1874 and what was repeated in 1890.

But who can say the city would have the company at its mercy twenty years after 1890? Conditions might be such that the right to renew the contract *at a ten per cent reduction in hydrant rentals* would be a most valuable right. We can conceive of water becoming so valuable that it would be far better for the water company to take its water and sell it for irrigation or to other smaller cities than to renew its

contract with Denver at a reduced rate, involving, as it probably would, new pipes and new expenditure of moneys. Was it not natural and proper therefore for the city to reserve this option?

And would the city at the end of the twenty years beginning in May, 1890, have the water company any more at its mercy than it would twenty years after December, 1870, when the first contract was made? From the language of the court and of counsel it was the water company that had the city at its mercy rather than the city having the water company. And yet we have the actual contracts of 1870 and 1874 that no amount of ingenuity can construe beyond the granting of a contract or franchise that expired in 1891. The plain reading of the contract of 1890 is to the same effect. The mere adding of an additional provision giving a new option to the city surely is not a changing of the whole situation and should not call forth all of the powers of a high court to wrench its meaning to something else and some six hundred odd printed pages by able lawyers to prove that the court was right.

We simply find the city granting an ordinary water franchise and protecting its own interests with clauses that give it—(*a*) an option to purchase at the end of the franchise; (*b*) an option to renew the contract at its election, and at the same time keeping an element of restraint on the company at all times by reserving to itself the power to build its own plant at any time it saw fit.

We submit this to be the logical meaning of the contract, the only meaning that can be gathered from its words, and the most probable one suggested by the situation of the parties and the circumstances surrounding the transaction.

VII.

Validity of Any Contract to Renew a Franchise.

A word or two upon this matter in addition to what was said in our original brief. The legislature of Colorado, in 1889, prohibited the city of Denver from granting franchises or special privileges for a longer period than twenty years, and the charter of Denver has continued this prohibition. What is the object of such a provision? Is it not that at the end of twenty years all such franchises and privileges shall cease and the city then be free to treat the subject as a new one? Can the hands of the city be tied in any way at the end of the twenty years? It seems to us not, and that any construction that attempts such a result is ruinous and prohibited. In our original brief we called attention to the case of Clay Center *vs.* Clay Center Light & Power Co., 78 Kan., 390, as sustaining this proposition. It is contended by the trust company in its brief that this case was wrongly decided (page 102). A decision of the Supreme Court of Colorado, however, fully confirms it and establishes the law in that State, so that no subterfuge can defeat this provision. We omitted this case from our former brief, but quote the following from it:

> "It is no answer to this to say that the corporation is deprived of that which is valuable for the corporation is deprived only of that which by implication it agreed to relinquish upon the termination of its corporate existence. If the rule were otherwise the result would be that a toll road company which, under our statute, is limited to twenty years might indefinitely prolong its existence and perpetuate its franchises contrary to the express provisions of section 11 of article 2 of our bill of rights which prohibits the irrevocable grant of franchises by the general assembly; for just before the termination of its corporate existence its stockholders could (as was attempted to be done here) form a new corporation

to which the property and franchises of the old one would be transferred and the business continued, and when this second corporation was about to expire a third one could in like manner be formed, and so on for all time; and thus indirectly the legislative will could be thwarted, and the constitution with impunity evaded, and the perpetuation of franchises be accomplished and a monopoly established contrary to the letter and spirit of our law."

Virginia Cañon Toll Co. *vs.* People, 22 Colo., 429, 433.

So in the case of a grant of a franchise to occupy streets it might be prolonged indefinitely and the law evaded by agreements to renew at the expiration of twenty years. This whole agreement was void.

VIII.

Question at Issue.

It should be kept in mind that the court has before it at this stage of the litigation simply orders of injunction forbidding the city to construct its own water plant, and the ultimate question now is whether or not the city may build its own plant.

The New York Trust Company, not a resident or taxpayer of the city and county of Denver, but merely a trustee under a mortgage covering part of the property used by its mortgagor, The Denver Union Water Company, in supplying the city and its inhabitants with water, procured the injunction restraining the city from building its own works, upon the original bill filed in the cause.

It does not appear from the bill (or cross-bill for that matter) that the city, by constructing its own works, will in any manner disable itself from performing its contract obligations, whatever they are, either to the trust company or the water company, and the position of the city is that whatever may be its obligation as to the purchase of the water

company's plant or the renewal of its franchise, it has the power under the law to proceed to build and operate its own plant.

The bill of the trust company, under well settled principles, determined the limits of the controversy, although by its cross-bill the water company presents numerous questions relating to the validity of section 264-A, under which the city was acting, which only a party suing as a taxpayer may present. That the controversy regarding *contract rights* presented by the bill and the controversy respecting a *taxpayer's rights* attempted to be presented by the cross-bill are distinct controversies and not germane one to the other, seems beyond question. The cross-bill may present only matters relating to, and necessary to the complete determination of, the controversy made by the bill. The bill is brought by one not a taxpayer. (See Petitioners' Original Brief, p. 201.)

IX.

The Question of Jurisdiction.

It is to the bill of the trust company that the court must look in determining the question of jurisdiction in a Federal court. Such jurisdiction is asserted upon the two grounds of diversity of citizenship and the existence of a Federal question. The question of jurisdiction is complicated by the fact that the bill presents practically two suits, one for an injunction, and one for the specific performance of an alleged contract, so that it arises under four different aspects. There is the further complication arising upon the contention of the trust company that the application for the injunction is the main or primary feature of the case, while the specific performance of the alleged contract is ancillary or subsidiary. It is difficult to see how specific performance in this case can or could be "ancillary" to the injunction sought, but the trust company has taken this position in

order to avoid the rule that the assignee of a chose in action may not sue when its assignor could not. An "ancillary" proceeding is one auxiliary to, or in aid of, a principal one; but the relief of specific performance here sought is in no sense in aid of, or auxiliary to, the injunctive relief sought.

But assuming for the argument that the position of the trust company is correct, yet if there is no jurisdiction in the Federal court on the ground of diversity of citizenship, upon the principal proceeding—that is, the application for the injunction—how can such jurisdiction arise upon the ancillary or auxiliary proceeding?

There is no jurisdiction on the ground of diversity of citizenship, whatever be the formal arrangement of the parties made by the pleader, unless there is a conflict of interest or a "justiciable controversy" between the parties aligned upon opposite sides. Here the trust company and the water company are in complete accord in respect to the injunction sought by each and granted on the bill and cross-bill respectively. This is practically conceded by the trust company in its brief in this court (p. 68). If there is any conflict or controversy between them (and we contend in the main brief that it is pretended), it is as to the relief to be awarded upon the specific performance or "ancillary" branch of the case, and the difference there is merely as to the legal construction or effect to be given to various ordinances and acts—to certain undisputed facts.

The trust company admits in its brief that the suit might have been one for an injunction only. It says: "The trustee might, had it seen fit, have refrained from demanding the specific performance of the contract" (p. 203). But if the suit had been for an injunction only, the Federal court would not have had jurisdiction on the ground of diversity of citizenship, because the water company, in accord with the trust company so far as the injunctive relief was concerned, would have to be aligned upon the same side.

The trust company, in attempting to sustain Federal juris-

diction on the ground of diversity of citizenship, justifies the alignment of the water company as a party defendant upon the claim that, though there is no conflict or controversy between the two companies, so far as the application for the injunction is concerned, there is a controversy between them which justifies their alignment as opposing parties in the ancillary or auxiliary branch of the case. We do not believe that this position is tenable.

It is submitted as the more reasonable view that the trust company by its bill practically presents two suits, either one of which could be brought independently of the other.

In reality there are two distinct forms of relief sought, and two suits presented by the bill to procure such relief. For the purpose of the argument here, we may assume that if the suit for the injunction could be maintained in a Federal court on the ground of diversity of citizenship, then also the suit for specific performance joined with it could be maintained in that court, notwithstanding the statutory prohibition against an assignee suing where the assignor could not. But here, as we have seen, the suit for an injunction could not be maintained in a Federal court on the ground of diversity of citizenship. We might also concede, *arguendo,* that if the suit for specific performance could be maintained in a Federal court, the suit for an injunction joined with it could also be maintained. But here the suit for specific performance cannot be maintained by the trust company in a Federal court, because its assignor, the water company (a citizen of Colorado), could not maintain it in that court. There may be a "justiciable controversy," diversity of citizenship, and the requisite jurisdictional amount involved in a suit in a Federal court, and yet if the suit is one to recover the contents of a chose in action, the assignee thereof may not sue in a Federal court if the assignor could not.

In this case the trust company could not maintain in the Federal court separately either the suit for an injunction or

the one for specific performance, but by combining the two in one proceeding, and finding a "justiciable controversy" in the latter, it seeks to escape the difficulties of the situation and asserts that there is jurisdiction in a Federal court on the ground of diversity of citizenship. In this way the statute prohibiting the assignee of a chose in action from suing in a Federal court where the assignor could not, and the rule that parties must be aligned according to their interest in the controversy, are both evaded. We submit that the mere device of combining two suits, neither of which could be maintained separately in a Federal court on the ground of diversity of citizenship, cannot be successfully employed to confer such jurisdiction.

The claim of jurisdiction on the ground of diversity of citizenship should not be sustained.

Is there a federal question stated in the bill? In the main brief we cited numerous cases holding that the allegations presenting such question must be a necessary part of complainant's statement of his cause of action, and may not be made by way of anticipation of a possible defense.

Viewing the bill as one for specific performance, we assert confidently that its averments which attempt or purport to state a Federal question are not a necessary or proper part of the cause of action for specific performance, and are made by way of anticipation of a possible defense. A party suing for the specific enforcement of a contract states his cause of action properly and sufficiently without any statement of what the defense of defendant will or may be, and his answer to such defense.

Considering the bill as a suit for an injunction, we contended in our main brief that even if it could be said to present a colorable Federal question at all, it was one devoid of merit. The Federal question suggested was whether the obligation of a contract of a city to purchase an existing water plant is impaired by the subsequent act or charter provision of the city authorizing the construction of a mu-

nicipal plant, where the city has not expressly agreed not to build and operate such a plant. We have shown in our original brief that this question was foreclosed by the prior decisions of this court, so that it could no longer be deemed a "question" upon which jurisdiction in a Federal court could be founded.

We do not believe there is jurisdiction either upon the ground of diversity of citizenship or the existence of a Federal question.

X.

The Contract.

No one can read the voluminous briefs filed by the respondents without feeling that those parties are hoping to win this case by befogging the issues. The questions really involved are very simple and have been before this court many times. They are: (1) Is there a contract between the city and the water company? (2) Has the obligation of that contract, if it exists, been impaired? (3) Was it proper to restrain the city from proceeding with the construction of a municipal plant?

This court holds that municipal grants must be construed in favor of the public and that any ambiguity in the terms thereof must be resolved in favor of the city. But the trust company says on page 80 of its brief:

> "This court has never been called upon to apply and has never applied the rule to a contract involving the purchase by a city at a fair valuation of a water plant."

First, we desire to impress upon this court our contention that there is absolutely no ambiguity in the terms of sections 11 and 12 of ordinance 44. They are clear and unambiguous. Language could hardly express the meaning of the parties more clearly, but we have been compelled in our

argument to assume that there is ground for more than one construction of these sections, for if the plain meaning of the words be adopted the whole case vanishes into nothingness.

The trust company then continues:

> "In insisting that the city is obligated to purchase we are asserting no special or unusual privilege adverse to the public interest" (page 80).

[If this is the case why was the injunction prayed for? Why is the city interfered with in its attempt to construct a municipal plant?]

> "On the contrary the complainant says that the defendant city (which apparently desires to embark in municipal ownership of a water plant) should acquire that plant at an appraised value of its true worth under its existing contract so to do" (page 80).

That is to say, although there may be an assertion of a special or unusual privilege adverse to the public interest in an exclusive franchise to operate a waterworks system for 20 years, there is no such assertion in a franchise for 20 years coupled with an agreement to purchase at the end of that time, even when the city cannot construct its own plant then. If there is no special or unusual privilege adverse to the public interest, why is the injunction prayed for? Why the allegations of the bill that the city has impaired the water company's contract by adopting section 264-*a*, which provides for the construction of a municipal plant? All of these complications arise from the construction of sections 11 and 12 of ordinance 44 that is contended for by the trust company, and yet it argues that the only question is the city's obligation to purchase.

In other words, the trust company contends that as sections 11 and 12 only contain the city's agreement to purchase they are not subject to the rule of strict construction of municipal grants, and then under a rule of construction

favorable to the grantee it contends that such provisions are implied in the contract as to require the city to purchase the plant at the end of twenty years, and by denying it the right to construct a municipal plant at that time to insure to the water company an exclusive franchise for that time. For unless the city had no right to construct a municipal plant during the twenty years succeeding the enactment of ordinance 44, it cannot be enjoined from doing so now. The trust company contends that as sections 11 and 12 do not grant any special privilege adverse to the public interest, the rule of strict construction does not apply and, having wiped that rule out, it proceeds to read into the sections a special privilege adverse to the public interest.

On no other theory can the prayer for the injunction be justified. If sections 11 and 12 merely reserve options to the city, as the city contends, then of course there is no dispute as to their meaning. If sections 11 and 12, however, obligate the city to purchase the water company's plant, as complainant alleges, then, if the city may be restrained from erecting its own plant, it must be because its obligation to purchase limits it to that particular plant, and section 11 is consequently a limitation on the city's power to acquire a water plant. And this conclusion is unassailable even though it be held that section 12 merely reserves an option to the city to renew the contract with the water company, for in such case the city is likewise limited to one plant. Consequently sections 11 and 12 do come within the rules of construction laid down by the court in cases of grants of franchises and of limitations on governmental powers of municipalities, for ordinance 44 and these particular sections thereof would grant a franchise which, as we have seen, would be a non-competitive one if the trust company's construction is adopted.

But it may be argued the franchise is not non-competitive. Then on what possible theory can the injunction restraining the city from constructing a new water plant be

justified? If it can be upheld now, why could it not be granted prior to April 10, 1910 (the date when under ordinance 44 the city was required to elect if it would purchase)? Is it possible that the city can be enjoined now at the instance of the trust company from erecting a plant when it could not have been enjoined prior to April 10, 1910? If so, on what possible theory? And if the city could have been enjoined prior to April 10, 1910, it is only because the franchise did not permit the city to erect a competing plant, and it could only have so agreed by virtue of the provisions of sections 11 and 12 of ordinance 44, and hence these sections must be construed as municipal grants or limitations are construed.

If all the trust company desires is to compel the city to purchase the water company's plant, the rights and wrongs of the case can be argued in a very few pages. Where has the city agreed to purchase? And if it has, let the water company bring an action for the price. But if that is the case, let it set aside all questions of impairment of contracts, all questions of enjoining the city from proceeding with the construction of a municipal plant, all questions except whether there is such a contract and whether the price has been fixed, or if not how it shall be fixed. That will make a very clear-cut controversy, one quickly decided, and one that can be briefed in a very few pages.

The key to the involved allegations of the bill and the cross-bill is the desire of the water company to prevent the city from constructing a municipal plant and its desire to get into the Federal courts. With this key the maze of the pleadings is unlocked, for even the herculean efforts of the respondents to escape the fact that sections 11 and 12 of ordinance 44 of the series of 1890 merely reserve options to the city, could not alone account for all the complicated machinery set in action and the obscurities and divagations of the pleadings.

The water company contends it does not claim an ex-

clusive or non-competitive franchise, and the trust company says the same. Then, if the city is obligated to purchase the water company's property, as the trust company alleges, or to renew its franchise, as the water company claims, why all this pother about enjoining the city from constructing a municipal plant? If the city has agreed to purchase, the construction of a new plant cannot affect the old plant or its value.

The cases cited by the trust company in support of its contention that sections 11 and 12 of ordinance 44 of 1890 are not to be construed according to the rule laid down in the Charles River Bridge case, the Hamilton case, the Joplin case, the Hutchinson case, and many others, do not support its contention. At the most they hold there is a difference between the business powers and the governmental powers of a city and not that any different rule of construction should be adopted in the acts of the city effectuating those powers. In the National Water Works Co. case, in 62 Federal, the court held that the title to the water works which the city had contracted to purchase did not pass absolutely to the city without any tender of payment, leaving the water company to secure payment therefor as best it could; that the fact that the city was a public corporation did not change the usual law that payment and delivery should be simultaneous, and the quotation on page 81 of the trust company's brief when examined in the light of this fact shows that no question of construction was concerned. In fact the court expressly disclaims in that part of its opinion which is quoted any examination of the rule of construction we contend for.

In the Walla Walla case this court, after stating the distinction between the business and the governmental powers of a city, says in words immediately following the excerpt quoted by the trust company:

> "Questions respecting this distinction have usually arisen in actions against the municipality for the negligence of its officers."

And then continues:

> "It is now sought to carry this distinction a step farther and to hold that if a contract be made by a city in its proprietary capacity, the question whether such a contract has been substantially affected by the subsequent action of the city does not present one of impairment by act of the State or its authorized agent, but one of an ordinary breach of contract by a private party. * * * How far this distinction can be carried to defeat the jurisdiction of the court or the application of the contract clause may admit of considerable doubt if the contract be authorized by the charter; but it is sufficient for the purposes of this case to say that this court has too often decided for the rule to be now questioned that the grant of a right to supply gas or water to a municipality and its inhabitants through pipes and mains laid in the streets is the grant of a franchise * * * and * * * is protected by the Constitution of the United States." * * *

It was contended by the city in the Walla Walla case that there was no such impairment as the Constitution forbade, because the contract of the city alleged to be impaired was not a governmental act but a business act. It is contended in the case at bar by the trust company that the rule of construction applied by this court to grants of franchises is not applicable because there is no question regarding a franchise in controversy. But the contract, whatever it is, is contained in and is a part of ordinance 44, which grants a franchise to the water company, and hence the canons of construction applicable to franchises and grants must control. For unless sections 11 and 12 merely reserve options, as the city contends, they contain an agreement which by its nature is akin to the grant of an exclusive franchise. Else how can the injunction be justified?

The other cases are of the same nature, recognizing a difference in the powers of a city, but not stating any different rule of construction applicable to the exercise of those powers.

What is ordinance 44? It grants the water company the privilege of laying its pipes in the streets of the city; it makes a contract with the water company for the municipal supply of water; it permits the water company to make contracts with individuals for their private supply of water. In other words, it grants a franchise; then as incident thereto the city reserves the right if it so elects to purchase the water works at the end of twenty years, or if it so elects to renew the contract at a reduced rental, or else, as the respondents contend, it agrees to purchase or renew. If the latter construction is correct, *then that agreement must be part of the franchise.*

But say it is not; say that it is the mere exercise of the business power of the city, and as such is not to be construed by the rules laid down by this court in construing franchise grants. Say that the rule of construction applicable to contracts between private parties is to be applied. Even then there is no agreement on the part of the city that it will either purchase or renew. Under the rule of construction most liberal to the grantee such an agreement cannot be read into sections 11 and 12.

And, furthermore, if the agreement in sections 11 and 12 is not part of the franchise, but is (what the franchise is not) a mere exercise of the business power of the city, then we can truly say that any impairment of such agreement does not come within the purview of the provision of the Federal Constitution, as it becomes a mere business contract between individuals.

The United States Circuit Court of Appeals for the Eighth Circuit has carried the distinction between the business and the governmental powers of a municipality to greater lengths than any other court, but even that court has never held that the same rules are applicable to contracts between private parties and those to which a city is a party.

It is not expressly contended by the trust company that sections 11 and 12 should be construed by rules different

from those employed in construing the other parts of ordinance 44, nor can it be so contended. Ordinance 44 is a municipal grant and must be so construed, and sections 11 and 12 being parts thereof must come under the same rule of construction, the rule laid down in the Hamilton, Joplin, Hutchinson, Knoxville, and many other cases, that nothing is to be taken against the municipality by implication, and that every ambiguity is to be resolved in favor of the public.

The position is taken by the water company that its "franchise or privilege" is not limited by the 20-year statute, because that "franchise or privilege" was derived from the State, not the city, and that limitation applies only to the city. We do not exactly comprehend if the company does not rely on the franchise granted to it by the city and the alleged impairment thereof by the city, where the water company and its *alter ego*, the trust company, find their Federal question. If they eliminate the city's franchise from the controversy, they leave nothing but a refusal by the city to perform a contract, even if all their allegations and conclusions of law be taken as true.

But counsel cite no authorities to sustain their contention that their franchise is not granted by the city. There are many cases heretofore decided in this court which are directly opposed to their contention. Undoubtedly, as counsel say, they derived their right to do business from the State, and this while called a "franchise," yet Mr. Morowetz showed many years ago, as

> "all persons have now the right of forming corporate associations upon complying with the simple formalities prescribed by statute, the right of forming a corporation and of acting in a corporate capacity under the general incorporation laws can be called a 'franchise' only in the sense in which the right of forming a limited partnership or of executing a conveyance by deed is a franchise."
>
> 2 Morawetz, Priv. Corp., sec. 923.

And as any one can form a corporation in Colorado, so any one can form a corporation for the purpose of supplying Denver or Pueblo or Colorado Springs or all of them with water on merely the payment of a few dollars for incorporation fees. And while this is called a "franchise" it is not the franchise on which the water company and the trust company rely. That franchise is the right granted to the incorporated company to do business in the city of Denver by furnishing water to the city and its inhabitants.

Counsel certainly would not contend that the Vicksburg Water Co., in 202 U. S., did not possess a franchise granted by the city. Do they contend that permission to supply water exclusively creates a franchise while mere permission without the exclusive feature does not? In the Walla Walla case there was a franchise from the city, for this court has said so, but it was not exclusive, the city having merely contracted not to build a competitive plant during the lifetime of the franchise, and in the Helena case there was not even that agreement on the part of the city. And yet they had franchises, else they had never been able to invoke the jurisdiction of the Federal courts.

Counsel for the water company criticise, on page 160 of their brief, our citations of the New Orleans cases in support of our statement that the right to do business in the city, the right to supply the city and its inhabitants with water, is a franchise (Petitioners' Original Brief, pp. 190, '1) because in those the grants had been made by the legislature. But as this court has said in regard to these very cases:

> "It is true that in these cases the franchise was granted directly by the State legislature, but it is equally clear that such franchises may be bestowed upon corporations by the municipal authorities provided the right to do so is given by their charters."
> Walla Walla *vs.* Walla Walla Water Co., 172 U. S., 1, 9.

The argument made by the trust company in support of its contention that the grant of power to the city council of Denver "to provide the city with water" is broad enough to authorize the council to agree to purchase a water-works plant 20 years in advance would justify almost any action which might be taken by the council. It is contended that the authorization "to provide the city with water" is unlimited save by the duty to exercise it with reasonable discretion. But this court holds otherwise. It holds that the grant of power to a municipality must be express or necessarily or fairly implied in or incident to the express powers, or indispensable to the accomplishment of the declared objects and purposes of the city. As we have shown in our original brief, an agreement to purchase at the end of twenty years does not come within any of these powers. Under the trust company's contention the city would have had the right to grant an exclusive franchise, but this court has frequently held that under such a general grant of power it would not, as the power to grant an exclusive franchise is not expressly granted. Nor is it granted by implication in the authorization to grant a franchise, nor is it indispensable to the objects and purposes of the city. And an agreement to purchase at the end of twenty years under a power "to provide the city with water" is a parallel case. To make such an agreement legislative authority is necessary, such as is found in the cases cited by the trust company and examined in our original brief (page 111).

The case of Castle Creek Water Co. *vs.* City of Aspen, 146 Fed., 8, is extensively quoted both from the opinion of the *nisi prius* judge and from the briefs of counsel. The judge denied the relief prayed for by the water company, but held in an *obiter dictum* of the most uncalled-for character that although there was no agreement on the part of the city to renew the company's franchise, yet that duty was imposed upon it by implication if it did not purchase the company's plant, *though no such question was in the case.* The alle-

gation of the bill quoted on page 117 of the trust company's brief that

> "your orator would have applied for and could under said contract and the statute in such case made and provided have secured a renewal," etc.,

means that it was possible if the city had not notified the company that it intended to purchase (which action it afterwards attempted to revoke, such attempted revocation being the basis of the action) the company would have had the time to apply for a renewal, not that it was *entitled* to a renewal, as the trust company states in its brief. The company prayed for a specific performance of the agreement of purchase (146 Fed., 8, 10), and that was all. And as the Court of Appeals said:

> "If the city was not to buy the property, the water company had the privilege and the right by the express terms of the contract to secure another franchise or an extension of the franchise which it held, IF IT COULD DO SO, and if it could not, to sell to another who might be able to accomplish this result and it had the right to know that it could exercise this privilege and that it could embrace every opportunity that offered during the 12 months which followed October 31, 1904" (capitals ours).

The trial judge in dismissing the bill signified in the above-mentioned *obiter dictum* that the water company's rights were much greater than it claimed to have. And as a matter of fact Judge Sanborn, speaking for the Circuit Court of Appeals, did not in any way indicate that the water company was entitled to a new franchise if the city did not purchase as counsel say he did (Trust Company's Brief, p. 123). The above quotation from the opinion shows what he held.

The letter written by Charles S. Thomas, upon which counsel so strongly rely, was written by a private citizen to the mayor of the city. That this citizen afterwards became

one of the counsel for the city in this litigation is of no importance, nor do we conceive that the opinion is of any value for the purpose for which it is offered—*i. e.*, to show the contemporaneous construction placed upon the contract by the city. The whole letter appears in the record, but counsel have carefully culled therefrom certain portions which they imagine is suited to their ends. It will be noted that what Mr. Thomas refers to in these excerpts is the "rights and privileges" granted in sections 1 and 2, the right to lay pipes, etc., in the streets, etc., of the city. It will be noted that all of Mr. Thomas's conclusions are not referred to by counsel. It will also be noted that "the views above expressed are those of first impression."

The fact that the respondents devoted so much space and rely so strongly on this letter and the Castlee Creek Water Co. case, reveals that they realize the weakness of their position.

XI.

Contemporaneous Construction.

We have discussed in our original brief the doctrine of "contemporaneous construction" of a municipal franchise and have discovered it is not applicable. Especially where the ordinance is as free from ambiguity as the one in the present case is it inapplicable.

But as matter of fact the alleged contemporaneous construction of the contract on which respondents rely does not support their contention that the construction they now claim has always been accepted by both parties. Ordinance 54 of the series of 1894 is as consistent with the city's construction of ordinance 44 of the series of 1890 as it is with the respondents'. We have shown this in our original brief and in this brief. Ordinance 163 of 1907 is consistent only with the city's construction, and this ordinance was accepted by the water company. The letter of C. S. Thomas, even if

it were conclusive of what the city's construction of ordinance 44 is, does not sustain the respondents' contention. But the water company itself never made any pretension, prior to April 10, 1910, so far as we are advised, that they were entitled to have their plant purchased or their contract renewed. To be sure, the bill alleges that such was their belief, and while they support this averment by an affidavit upon information and belief of the general manager of the company they are not able to point out any overt acts which were taken to signalize that belief. On October 20, 1894, four years after ordinance 44 was passed and the same year that ordinance 54 was passed, which is claimed to be conclusive as "contemporaneous construction," the water company executed a mortgage to the Continental Trust Company, the predecessor of the New York Trust Company, which mortgage is relied upon by the New York Trust Company as giving it authority to bring the present suit. This mortgage it attached to and made a part of the bill as Exhibit B, and is found on pages 42 *et seq.* of the printed record. It must therefore be considered as part of the bill. A careful reading of this instrument will show that it is a particularly explicit and carefully drawn mortgage as befits a security for eight million dollars. There are thirty-one "stipulations, covenants, and agreements" to which the mortgage is subject, all of which are clearly expressed. Every contingency is provided for and no detail is overlooked. The twentieth paragraph, found on page 61 of the printed record, we desire to call particular attention to as an instance of "contemporaneous construction" of ordinance 44, as it was construed by The Denver Union Water Company and the predecessor of the complainant in the present case.

> "In case the city of Denver shall have the right to purchase the works and property of the first party situated within its corporate limits on the tenth day of April, 1910, and in case of such purchase if the first party shall be obligated to deliver the property of the first party so purchased to the said city of Denver free and clear of all incumbrances and it shall be

> necessary to pay off and redeem the whole of the indebtedness secured by this instrument it is agreed that all the moneys to be received by the said first party from the said city of Denver on account of said purchase shall be payable to the said second party directly from the city, and the same are hereby assigned to the said second party for the purposes of the trust by this instrument created."

Respondents seek to nullify the effect of this covenant on the ground that it was carelessly drawn. But we have seen that the whole instrument is carefully drawn, and this particular paragraph gives evidence of having received the closest scrutiny. Ordinance 44 of 1890 wherein the city reserves the right to purchase makes no provision in case the plant is mortgaged; hence the mortgagor and mortgagee make a careful and explicit agreement as to what procedure shall be followed in case the city exercises its option—nay, more; the parties realize that if the city does exercise its option some question may arise as to what the exact status will be of the mortgage (which covers all the property) on the property which the city may elect to purchase, and whether the whole mortgage may have to be paid and they have provided for that. Does that show carelessness or slovenliness in preparation? And is it not remarkable that this carelessness should have led to the adoption of a construction of ordinance 44 which is what the city contends for? Is not that more than a coincidence?

> "In case the city of Denver shall have a right to purchase, * * *."

When would it have a right to purchase? On April 10, 1910, *if it so elected*. Before that date and before it elected it had no *right to purchase*. It had a *right to elect to purchase*, but after it elected it had a *right to purchase*.

What property did it have the right to purchase?

"The works and property of the first party, situated within its corporate limits," *i. e.*, of the city of Denver.

That is all; exactly the same property which ordinance 44 of 1890 reserves to the city the right to purchase and what the city now contends as it has always contended. How then can the city be now obligated to purchase all of the property owned or used by The Denver Union Water Company or other corporations or individuals, no matter where situated or from whom acquired by virtue of any agreement in section 11 of ordinance 44? And how can the city be enjoined from constructing a municipal plant even if it is obligated to purchase the property which ordinance 44 covers?

We think the weight of "contemporaneous construction" does not favor the respondents, especially as the water company *after April 10, 1910,* submitted a new franchise to the electors of Denveer and not until after that was rejected did it publicly claim to have any rights under sections 11 and 12.

XII.

Decision of Court of Appeals.

On page 142 of the trust company's brief, in attempting to explain away the finding of the Circuit Court of Appeals that the city had neither elected to purchase nor to renew, counsel say:

> "What the court meant was that by affirmative act the city had neither purchased nor renewed. The language was not intended to mean that by operation of law and without affirmative action by the city it had not elected to purchase."

But counsel are wrong. There is no allegation in the bill or the cross-bill of any express election by the city—certain acts were set forth and it was alleged as a legal conclusion that these acts constituted an election, and the Court of Appeals says:

"The facts are stated upon which these claims are based and it does not appear to us that the city has done either," *i. e.*, elected to purchase or elected to renew.

Consequently, the Court of Appeals was necessarily examining the very facts which the respondents had set forth and which they had alleged constituted in law an election. But if there was no election the case should fail, as by the terms of sections 11 and 12 there must be an election and it is on the theory that there was an election that the bill and cross-bill were based. For unless there has been an election no court can compel the city to elect and the bill must be dismissed as no relief can be granted. Counsel for the trust company practically admit this, and to admit this conclusion is to admit that the decision of the Court of Appeals is wrong.

Counsel for the trust company contend strenuously, on pages 147 *et seq.* of their brief, that ordinance 163 of the series of 1907 constitutes an election to purchase by the city and through a course of devious reasoning seek to support their contention, notwithstanding the fact that ordinance 163 expressly provides that the purchase of the water company's plant shall only be made in case the voters so decide, and notwithstanding the further fact that under the terms of ordinance the election could only be made on April 10, 1910.

But although counsel seek to support this contention by saying, "at the time the city council passed ordinance 163 of 1907 there was no charter provision of Denver to the effect that the city might not elect to purchase this water plant without submitting the question to a vote of the electors" (page 159), the fact is that a vote of the electors was necessary as will appear from sections 252 to 260 of the charter of the city and county of Denver, which was adopted March 29, 1904. Those sections have already been discussed.

Consequently the city council could not by ordinance purchase a water plant; consequently section 163 (accepted

by the water company) provided for a submission to a vote of the electors the question of purchasing, and consequently counsel's argument falls to the ground with the destruction of its foundation.

There is one notable feature regarding these contentions that ordinance 163 and section 264*a* are elections by the city to purchase and that is that in order to contend thus it is necessary for the trust company to abandon its other contention that ordinance 44 of 1890 obligates the city absolutely. To argue that 163 or 264*a* constitutes an election is to admit that an election was necessary and shows that the trust company is not very sure of any of its positions. It has filed its bill relying on diverse citizenship; then, fearing this device would prove insufficient and that the parties might be realigned, it has attempted to state a Federal question—an alleged impairment. The water company, too, in its cross-bill, has tried to inject a Federal question. Then the parties, by stating every event that has occurred since water was first supplied to the city of Denver, have hoped that some court might be able to discover a cause of action hidden away that they themselves had overlooked. Besides the trust company's admission, on page 80, shows that it is willing to adopt the water company's contention and that there is no real controversy between them. It says in effect, any relief will satisfy us, but we prefer the purchase price; we set out the acts and if the court decides the water company is right let us have the relief it prays. Is this a *bona fide* controversy? Is it not merely a splitting of the action between the two companies, and is it not merely a collusive attempt to invoke the jurisdiction of the Federal court?

XII.

Obligation to Purchase.

It is contended by counsel (p. 162) that the city is still under an obligation to submit the question of purchasing the water company's plant at the valuation of $14,400,000 fixed by the appraisers under the terms of ordinance 163 of 1907. That ordinance expressly provides that the two propositions shall be submitted together; one whether the city should purchase at the appraised value and the other whether it should grant a new contract. *The proposition for a new contract was to be prepared by the water company.* This it has never done. It could not do it, it is true, because the appraisers did not, and one of them reported that they could not, prepare a table of rates such as the ordinance provided should be the basis of the new contract. Counsel now attack this report of one appraiser as to their inability to fix this table of rates. But the fact that the table of rates was not fixed is the only excuse the company has for not preparing a proposition for a new contract such as was provided for in the ordinance. If they do not consider this reason sufficient they have no excuse for not submitting a proposition for a contract and consequently the blame for not submitting the two questions in ordinance 163 falls on them, as they did not carry out their part of the agreement. The city was obligated and ready to submit the question of purchasing the water company's plant at $14,400,000 when the water company prepared its proposition, which by the terms of the ordinance was to be submitted at the same time. The water company did not, and as we have seen (though it appears to decline to benefit by that fact) could not, prepare its proposition and the city *was not authorized to submit the single proposition of purchasing.* Any further proceedings under section 163 were blocked and the water company made no effort to enter into another agreement.

But suppose the city had submitted the single question of purchasing at any election. If it were carried would the water company agree to convey? It alleges it considers the price too low, and the trust company avers it brings the suit because the water company refuses to take steps to compel the city to complete its contract of purchase *already entered into*. But it is not probable the proposition would carry, as the record shows that at an election held on May 10, 1910, a proposition to purchase the water company's plant for $9,000,000 was rejected by a large majority, while a proposition (section 264*a*) to offer it $7,000,000 was accepted by the voters.

There is as little basis for the trust company's contention that the adoption of section 264*a* by the city is an election to purchase under ordinance 44 as that the enactment of ordinance 163 of 1907 is. Neither makes any election or offer to purchase except on the specific terms proposed therein; ordinance 163, if the voters so decide, and section 264*a*, if the water company accepts the specific proposition it embodies. The water company rejected this proposition, and consequently there ended the negotiations between the city and the company under section 264*a*.

If, however, the city is obligated to purchase the water company's plant, either by reason of its adoption of section 264*a* or the enactment of ordinance 163 by the city council, and if this is the obligation which the trust company is seeking to enforce, why is it asking that the city be enjoined from constructing its own plant? Why is not the decree granting the injunction erroneous and why should it not be reversed?

XIV.

The Impairment of the Contract.

In the discussion under this heading in the trust company's brief we again find the same vagueness that is displayed in the bill as to what the contract is. On page 183 counsel speak of "the binding contract of purchase originally initiated by that ordinance 44," and say that "at the time of the passage of section 264*a* the city was obligated by contract to purchase this plant," and consequently that section 264*a* impairs that contract. Now if the "binding contract of purchase" is only "initiated" by ordinance 44 it must be completed by some subsequent act. That act, whatever it was, must have been prior to the adoption of section 264*a*, for it is said that when the city adopted that charter amendment it was already "obligated by contract to purchase this plant." The only intervening act is ordinance 163 of the series of 1907, and hence we are justified in assuming that if any contract is impaired by section 264*a* it is the contract of purchase initiated by ordinance 44 and completed by ordinance 163. This, however, is inconsistent with the idea that the bill is based upon a binding obligation in ordinance 44 and is only consistent with the idea that ordinance 44 left an option with the city. That option may have been only an option either to purchase or to renew, but even so, if the city had already become obligated to purchase by ordinance 163 (or otherwise) prior to the adoption of section 264*a* then if there exists any impairment it must be an impairment of that contract to purchase and not of the contract contained in ordinance 44, if any such there be.

This, however, is material as to the question of jurisdiction, because if the contract relied upon is the contract to purchase, it is apparent that no impairment can even be alleged with a semblance of good faith. Counsel evidently recognize this difficulty, and keep insisting that the contract

relied upon is that contract in ordinance 44. But when it is necessary for them to be explicit they find themselves obliged to add "and other acts." But if they rely on an alleged agreement to purchase they cannot rely upon an alleged agreement either to purchase or renew; the two propositions are inconsistent.

Now, bearing in mind that counsel are relying at least in this part of their argument on an alleged contract to purchase already entered into by the city, we fail to find any impairment of its obligation in the different matters which it contends are impairments on pages 183 and 184 of its brief. We have discussed this matter fully in our opening brief, and do not consider it necessary to revert to it. We pass over the easily-made averments of conspiracy, malice and cruelty, which have no support except the averments of the bill and the brief, merely stating that the three men constituting the public utilities commission, against whom most of these charges are made, are men of unassailable character. There has been a long struggle between the people of Denver and the water company, and there has been considerable bad feeling caused thereby; but while we feel that the city has fully as much reason for attacking the good faith of the water company as the water company has for attacking the city, we have nevertheless refrained, both in our pleadings and in our briefs, from making any averments concerning it. We have done so because we believe that such matters were out of place in this case, not because we have had no defense or counter-attack along these lines. In this suit as it is brought the question is of impairment, and we conceive it in no wise strengthens one's claim of impairment or the other's denial thereof to call his opponents knaves and blackguards.

The contention of counsel that section 264*a* is both an election to purchase and an impairment of the obligation created by such election is such a novel one that we believe we are justified in assuming that a law cannot have this

twofold effect in the absence of some authority cited by counsel in support thereof. Undoubtedly part of an act may be void and the remainder valid, but of course the whole act must be construed together and construed so as to make it all valid if possible. With this rule in mind it is impossible to give the construction of 264*a* urged by counsel, *i. e.*, that it is valid so far as its offer to purchase is concerned and void as to the price offered.

As to ordinance 98 of the series of 1910, it is so obviously enacted in accordance with the express terms of section 264*a* that it cannot be held void without necessarily holding that part of section 264*a* on which it is based void also. We have not discussed ordinance 98 heretofore because it is so clearly dependent upon section 264*a* that we believe it has simplified the issues by disregarding it entirely or rather by considering it as part of section 264*a*.

The trust company relies upon the case of Vicksburg Water Works Co. *vs.* Vicksburg, 185 U. S., 65, and quotes at length therefrom to support its contention that the acts of the city complained of in the bill constitute an impairment. But the Vicksburg case presents a question regarding an exclusive franchise and the objectionable acts must have been an impairment of the company's right to operate its system without competition, otherwise the case is contrary to

St. Paul Gas Light Co. *vs.* St. Paul, 181 U. S., 142.
Dawson *vs.* Columbia Trust Co., 197 U. S., 178.

XV.

The Cross-bill.

But there is one part of the brief in support of that part of the cross-bill which is based upon a cause of action entirely different from that stated in the bill. In its arguments heretofore made in the District Court and the Court of Appeals, counsel disclaimed any intention of relying upon cer-

tain allegations in the cross-bill as to taxes paid by it, for the purpose of having this part of its cross-bill considered as a taxpayer's bill. We have already quoted in our opening brief (page 200) counsel's admission to this effect, made in their brief filed in the Court of Appeals. Now, however, the water company contends the cross-bill can be regarded as a taxpayer's bill. We do not believe that this policy will commend itself to a court of equity. A party having deliberately taken a position in regard to his pleadings should be required to maintain that position.

But aside from this question, the water company should not be permitted to attack the validity of section 264*a* of the charter of Denver under the constitution of Colorado in this action. It is a citizen of Colorado and a taxpayer in Colorado, and the courts of that State are open to it if it desires to attack the constitutionality of the charter amendment, on the ground that its rights as a taxpayer are affected thereby.

The question of the validity of section 264*a* is not necessary or proper to be considered in an action brought to compel the city to purchase the water company's plant or to renew its franchise, because that franchise is not an exclusive one and the competition of the city is immaterial, unless it affects the legal rights of the complainant. If the section impairs the obligation of the water company's alleged contract under which the trust company claims its validity can be attacked on that ground. But it is not proper to permit its validity to be attacked because it includes more than one subject, or because it permits the candidates for the offices created thereby to be named therein, when those features of it do not prejudice any rights of the complainant or cross-complainant. In other words, it is proper to hold the act void because it attacks their rights, but it is not proper to hold it void for reasons which do not affect those rights. And furthermore, these objections raised by the water company to section 264*a* are almost all based upon the form in which it was drawn and submitted and not upon any lack of power in the city to provide for everything therein con-

tained. Therefore, if any one has, or rather had, a right to complain it is the electors to whom it was submitted and not The Denver Union Water Company, which, being a corporation, had no vote. Its solicitude for the rights of the voters is as out of place in this suit as it is unusual.

Counsel rely upon the case of

Farmers Loan & Trust Co. *vs.* Sioux Falls, 131 Fed., 890,

to sustain their contention that they can ask to have the city enjoined from proceeding under section 264*a* because it is void. This case, however, was a case in the Circuit Court reversed by the Circuit Court of Appeals (136 Fed., 721) on grounds which made it unnecessary for the appellate court to examine that question. In it, too, the Circuit Court held the city did not have the power to construct a municipal plant, while in the case at bar the power is admitted, but it is contended the city's procedure is improper, section 264*a* being a void act. Finally, the decision of the Circuit Court in the Sioux Falls case stands alone, we believe, in permitting a city to be enjoined from constructing a municipal plant where the water company did not have an exclusive or non-competitive franchise, it was reversed by the Circuit Court of Appeals and is contrary to the spirit of the Skaneateles, Joplin, Helena, and Hutchinson cases and others of that class. What difference is there between those cases and the one at bar? Because in them the city was proceeding under a valid act, while here it is alleged to be invalid? But would not the injury to the water company be just as much if the act was valid? Why, then, can it enjoin the enforcement of an act alleged to be void? The water company does not deny that the city could enact a law authorizing the erection of a municipal plant which it (the water company) could not object to even if it did reduce the value of its property. As the question is not one of power but merely of the method pursued there can be no injury to the water company's legal rights under its contract.

The court in the Sioux Falls case granted an injunction restraining the city from proceeding with the construction of a municipal plant, holding that under the State constitution it had no right to construct such a plant. It held that the water company was entitled to this protection because

> "if this municipality is without authority, or if it was forbidden to build and maintain a rival plant by the constitution or by the statutes of the State, that fact raises a persuasive—a controlling—equity which entitles the complainant and the water company to relief because they had the right to invest their money and to establish their business in the faith that the city would not be permitted to violate the constitution or the law to destroy their property or their business."

This basing the right on an equity is contrary to the decision in

Columbus *vs.* Mercantile Trust Co., 218 U. S., 645,

where this court refused to consider any equities of this nature as against the plain legal rights of the parties.

We do not believe that the Sioux Falls decision is good law; it stands alone and it is opposed in principle to many decisions of this court, including those referred to above, as well as to the class of cases like Owensboro *vs.* Waterworks Co., 191 U. S., 358, where it was held that the grant of power to regulate rates made subsequent to the granting of a franchise did not impair the obligation of the contract, and to Newburyport Water Co. *vs.* Newburyport, 193 U. S., 561, where it was held that the grant of authority to construct a municipal plant subsequent to the granting of a franchise did not impair the contract. If the power of the city at the time the contract was made is one of the elements of the contract, which must be the determining reason in the Sioux Falls case, those other cases could not have been determined as they were. But even if it is, that case only holds that where the city had not the power to construct water works,

it would not be permitted to do so if by so doing it would destroy the value of the property of one who had contracted with the city on the strength of this lack of power and it cannot be applied to a case where the power is admitted and only the question of the exercise thereof is raised.

Of course the decision in the Sioux Falls case has no bearing on that part of the present controversy raised in the bill, because if the city is obligated to purchase the water company's plant the building of a municipal plant cannot affect that obligation at all. It is only in case the water company should be held to be entitled to a renewal of its franchise that the decision can even be *argued* to be applicable here as authorizing an examination of the validity of section 264*a*, and then only because of the injunction prayed for to restrain the construction of a municipal plant which would compete with that of the water company operating under the renewed franchise and thus cause the alleged irreparable damage.

The attack made upon the validity of section 264*a* has been largely anticipated in our opening brief. Counsel seek by a very complicated course of reasoning, based upon the most flagrant technicalities, to show that section 264*a* is not a charter amendment, but something else. Considering the vast extension of the sphere of municipal activity that has taken place in recent years, and the character of legislation necessary to enable the municipality to meet its new requirements, we do not conceive that section 264*a* will be regarded as anything but what it was submitted as and what it purports to be.

It is also contended that section 264*a* should have been divided up and submitted in different parts; that each sentence should have been submitted separately; but in the absence of any limitation on the power of the city to amend its charter, this contention should not be sustained, as it might destroy the efficacy of any proposed change in the charter. Counsel quote various constitutional and statutory

provisions, from which they contend that a limitation can be inferred, but we submit that not even by adopting the severely technical method of construction contended for by counsel can such a limitation be inferred. The city is granted the broad right to amend its charter, and there is no provision limiting the number of sections of the charter, such as is found in the constitution of Colorado regarding the constitutional amendments, or in the number of subjects that may be included in an amendment such as is found in that constitution regarding legislative bills.

It is contended that section 264*a* contains matters not proper to be contained in a charter amendment and matters which are not germane to or *in pari materia* with each other, but these are the same objections in a different form, and we contend that all the matters are germane to the subject of the act, and consequently, even if there is any law that forbids more than one matter being included in a charter amendment, that law is not applicable. Counsel assume that there is some general principle of "natural law" that requires charter amendments or measures to be submitted in a certain way, but if there be such principle it is not applicable, as the question is one of constitutional and statutory authorization and limitation. It is also contended that section 264*a* is void because three persons are named therein for public utilities commissioners, as it is contended that voters may have been induced to vote for the general proposition who were opposed to these candidates, and if they had had a chance to vote for the commissioners singly might have rejected these. It is, of course, immaterial who are the commissioners, so far as any alleged injuries to the water company's rights, even its rights as a taxpayer, are concerned, but the twentieth article of the Colorado constitution expressly provides a method to be pursued by the class of voters whose interests are protected by the water company. Section 5 thereof (page 241, Petitioner's Original Brief), after providing for the submission of a charter, charter amendment or measure, says:

> "In submitting any such charter, charter amendment or measure, any alternative article or proposition may be presented for the choice of the voters and may be voted on separately without prejudice to others."

Under this provision any voter or body of voters dissatisfied with the names of the three commissioners, but who approved of the amendment otherwise, could have prepared an alternative proposition with other names. Consequently they were not forced to vote for these three men, even if they did approve of municipal ownership. As to the other objection, that these persons were not nominated, as required by the charter, we reply that this amendment created new offices, not provided for in the original charter, and consequently its provisions could not apply to them.

The decisions quoted from and relied upon by counsel in pages 189 to 213, inclusive, of its brief, other than the Sioux Falls case, in support of their contention that the water company can maintain its cross-bill even in the absence of any contract rights, but merely because it is engaged in a lawful business, and because section 264*a*, providing for a municipal plant which would destroy the value of its business, was improperly drawn and submitted (not denying that the city has power to construct a municipal plant in competition with the water company's system if the proper procedure is adopted), are all cases where some legal right of the complainant was interfered with by the act complained of, and which was alleged to be illegal because it did interfere with the legal right. In them the act was held illegal, because it did interfere with the legal right of the complainant. In the case at bar it is alleged that because the act is void it interferes with the company's right. The voidness of the act and not the act itself is what they allege as an interference. Counsel either cannot or will not see the difference. Their argument is based upon the same principle as one that to permit a void act to be enforced is to deprive one of his property without due process of law. But one cannot bring

a suit alleging that the enforcement of a void act, because it is void, would deprive him of his property without due process of law. He can, however, have an otherwise valid act declared void because its enforcement would deprive him of his property without due process of law.

There have been too many decisions made by this court to require us to cite any that even though a public service corporation is engaged in a lawful and necessary business a city may enter into competition with it although its competition may impair or destroy the value of the corporation's business and property unless the city has contracted not to do so. But the argument of counsel, based upon the decisions quoted by them, would, if applied to the many cases decided by this court, prevent the city entering into competition, if by so doing it injured the company's business. There are cases in the books which do so hold, it is true, but they are obsolete and are not authorities in this court.

Counsel contend that the decision in the case of City of Denver *vs.* Hayes, 28 Colo., 111, is controlling in this case as to the method in which section 264*a* was submitted, but a moment's glance at the facts will reveal the difference between the cases. The Hayes case is decided, as the court expressly states, on the ground that the council in its proceedings leading up to the issue of the bonds had not observed the provisions of the charter. The court finds there is no express provision requiring the question of a bond issue to be submitted, so that each purpose for which the proceeds of the bonds are to be used can be voted upon separately, but that such is the clear intent of the charter provisions relating to bond issues. Counsel have cited every constitutional, statutory and charter provision that could be found relative to the submission of amendments to the charter, but with all their ingenuity are unable to find any implication in any or all of them that each separate proposition contained in a charter amendment must be submitted in such form that it can be voted upon "yes" or "no."

And it is apparent that a well-designed and consistent scheme of constructive policy would be practically impossible to effect if such were the case.

It may be true, as counsel state, that in the then Circuit Court of Colorado the Hayes case was followed in the Grant case, holding that a submission of a proposition to issue bonds for the purpose of constructing *or* purchasing a plant was void even though that was the exact wording of the statute. The contrary, however, has been held in

Thomas *vs.* Grand Junction, 13 Colo. App., 80,

and the status of this question has been well stated in a recent case, as follows:

> "In support of the proposition that the question, as stated in the ballot used at the election, included two distinct and separate purposes, the petition cites Leavenworth *vs.* Wilson, 69 Kan., 74; Elyria, etc., Co. *vs.* Elyria, 57 Ohio St., 374, and Neacy *vs.* Milwaukee, 142 Wis., 590, to the effect that a proposal to issue bonds to 'purchase or erect' public works is a proposal for a dual purpose. These decisions merely represent one side of a conflict of authority. The following cases hold the contrary: Farmers', etc., Co. *vs.* Sioux Falls, 136 Fed., 732; Nash *vs.* Council Bluffs, 174 Fed., 102; Thomas *vs.* Grand Junction, 13 Colo. App., 90; State *vs.* Allen, 178 Mo., 555; State *vs.* Allen, 183 Mo., 283. In this State the more liberal rule has been followed. People *vs.* Corents, 89 Cal., 15; Oakland *vs.* Thompson, 151 Cal., 576."
>
> Clark *vs.* Los Angeles (Cal.), 116 Pac., 722.

To the above citations holding the submission valid might be added

Kemp *vs.* Hazlehurst, 80 Miss., 443, and
Swann *vs.* Murray (Ky.), 142 S. W., 244.

But, after all, that question is merely one of determining the authority of the submitting body by statutory con-

struction such as we contend for in this case; where a statute authorizes or directs the submission of a question of issuing bonds "to construct or purchase" water works, does it mean the submission may be made in those exact words or that the specific method of acquiring water works must be included in the submission?

And furthermore, there was no alternative proposition submitted to the voters when they voted on section 264*a*. The only question was, "Shall the city be vested with the power to do these things? And under ordinance 98 of 1910, enacted to carry out the provisions of section 264*a*, only a single proposition was submitted to the voters, namely, the question of the issuance of bonds to construct a municipal plant. But we have already discussed this phase sufficiently.

XVI.

Bill too Broad.

Counsel for the trust company contend that the objection made on pages 168 *et seq.* of our opening brief, that the bill is too broad, has been decided and set at rest in

Omaha *vs.* Omaha Water Co., 218 U. S., 180.

In that case, however, the city had expressly elected without qualification to purchase the property of the water company under a right reserved by it, and the value was fixed by appraisers. Afterwards it sought to repudiate the election on the ground that the valuation included property not within the submission, but the court held that the acquisition of the system as it existed at the time the city made its election was within the contemplation of both parties, but that was decided on the particular facts of that case. In the case at bar ordinance 44 of 1890, on which the trust company relies, reserves a right to the city to purchase "the said works," and the question arises can a bill praying for

enforcement of an alleged agreement to purchase the entire present property of The Denver Union Water Company, whether *owned or used* by it be maintained, when it clearly shows on its face that the only relief that can be granted is "the said works." Under the rule laid down in People's Gas Co. *vs.* Chicago, 194 U. S., 1, we submit the bill is too broad.

XVII.

City May Have Two Plants.

We have cited in our opening brief

Elyria Gas & Water Co. *vs.* Elyria, 57 Oh. St., 374,

to the effect that the city may purchase one complete system and may construct another. There is no authority outside of respondents' assertion to the contrary. And another case where the same question was answered the same way is

Janeway *vs.* Duluth, 65 Minn., 292,

where the court said:

> "It is alleged in the complaint that there is no necessity for a new water plant; that the present plant owned by a private corporation is adequate and sufficient for the needs of the city and its people, and that the new plant will entail needless expense on the taxpayers. Whether or not a new water plant is necessary is a legislative question, not a judicial one. The court cannot substitute its judgment for that of the city council and the voters of the city."

and in

Phœnix Water Co. *vs.* City of Phœnix, 9 Ariz., 430,

a case somewhat similar to the case at bar, where the water company alleged a right to have its franchise renewed and where it also alleged that it was a taxpayer and would be

injured by the city embarking in an unnecessary, ill-advised, money-losing proposition, the court said:

> "We do not deem it tenable that the question whether the construction and operation by the city of Phœnix of a system of waterworks would be an economical and wise enterprise for the city and taxpayers is a matter for judicial inquiry. The determination of this fact is lodged in the discretion of the city officers and of the taxpayers themselves at the bond election."

This case was appealed to this court and the appeal was dismissed.

> Phœnix Water Co. *vs.* City of Phœnix, 204 U. S., 674.

The case against the city cannot be sustained on any theory. The theory of the bill that the city has elected to purchase, must fail, as no such election on the part of the city can be shown. The theory of the cross-bill that sections 11 and 12 of ordinance 44 imposed on the city alternative obligations, is equally untenable, as in order to give these sections that meaning, it is necessary to disregard the ordinary meaning of language, the intent of the parties as expressed in section 21 of the same ordinance, and the universally accepted canons of construction in case of municipal grants. The theory on which Judge Lewis in the then circuit, now district, court granted the injunctive relief, that the city was obligated to submit to the voters the question of purchasing the plant of the water company at the appraised valuation, is erroneous, because there is no obligation on the city to submit one only of the propositions stated in ordinance 163 of the series of 1907, and the city had no authority to submit one proposition without the other. The theory of the Circuit Court of Appeals that section 264*a* impaired the obligation of the city's agreement either to purchase or renew is equally fallacious because this, like the water company's theory, requires sections 11 and 12

of ordinance 44 to be construed as they never should be construed, and for the further reason that it finds an impairment where no impairment exists; the court falling into the error of adopting the supposed intent of the electors in voting for 264*a* as creating the impairment instead of determining the legal effect of section 264*a* from the language used and in view of the powers of the city, and then finding whether the section so construed, worked any impairment. And finally if any or all of the above theories were right, the injunctive relief was improperly granted as no legal injury would be done to the water company's legal rights by the construction of a municipal plant.

XVIII.

Mere Breach is No Impairment of a Contract.

The respondents' position in regard to the question of impairment evidently is that any act that affects in the least the value of a contract, or that denies its obligation, is an impairment. But the question is: Is the contract which the city is now required to perform the same as it was before the act complained of was passed? If it is, there has been no impairment. Mere refusal is not impairment because the refusal does not release the city from, or lessen, its obligation. Nor is it an impairment of the obligation of a contract because the value of the contract is reduced if there was no obligation not to reduce its value.

Curtis *vs.* Whitney, 13 Wallace, 68.

We do not, as respondents state, take the position that only an exclusive franchise can be impaired. But there is something peculiar about an exclusive franchise which does not exist in case of a non-exclusive franchise that makes the grant of another franchise necessarily an impairment of it. And in case of a non-exclusive franchise it must be shown

by the party who alleges that its franchise has been impaired, that the franchise comes within the rule which is applied in case of exclusive franchises, *i. e.*, that something has been done which is inconsistent with the franchise, so that the contract which the city is now required to perform is not the same as it was before the act complained of was passed. Thus a grant of a later franchise is absolutely and necessarily inconsistent with the grant of an exclusive franchise. The city can no longer perform its contract of permitting the grantee to have the exclusive right to supply the city. But a mere refusal to perform a contract is not an impairment because the city can still perform its contract. Hence it is that exclusive franchises are different in their nature from non-exclusive franchises.

There are certain cases based upon alleged impairments where the question of rate regulation by the municipality is concerned. In these it is asked, does the city still retain the power to regulate rates, and if it is decided that it has, as in the Freeport water case, there is no impairment. But if it is held that the city has contracted away that right, as in the Detroit Street Railway case, an act of the city providing for rates is held an impairment, because such new rates are absolutely inconsistent with the original contract and make the contract different from what it was before the rate-making ordinance was passed. But if the city had merely passed an ordinance affirming that it still possessed the rate-making power, but without making any attempt to exercise that power, then a case arises analogous to the St. Paul Gas Light case, and there is no impairment.

A grant of a franchise whereby the city contracts away its right to regulate rates is identical in principle with the grant of an exclusive franchise, because the very act of a city in making rates, just as does its act in granting another franchise, changes the franchise to the disadvantage of the grantee. But what element of the franchise in the case at bar is akin to the exclusive or non-regulation feature of those franchises? Is it the agreement of the city to purchase?

Or its agreement to renew? The refusal to purchase, or even the construction of a municipal plant or the purchase of another plant is not in its nature an act like the granting of another franchise where an exclusive franchise has already been granted, or the enactment of an ordinance fixing rates where the city has contracted away its rate-regulative power. And neither is the refusal to renew the franchise even if coupled with the construction of a municipal plant, where the franchise is not exclusive or non-competitive like those other acts.

XIX.

Cross-bill Alone Cannot Give Jurisdiction.

It is contended by the water company that even if the original bill is dismissed the cross-bill must be considered if it states a cause of action "arising under the Constitution or laws of the United States." But the cross-bill does not state such a cause of action. As we have shown in our opening brief, the cause of action must not introduce any matters of defense in order to raise a Federal question, and as we further showed at the same time allegations that section 264*a* forbids the city from carrying out its contract with the water company and therefore impairs its obligation is matter of defense (Petitioner's Original Brief, pp. 52 *et seq.*). This same reasoning is applicable to the cross-bill. The Federal questions attempted to be stated in the cross-bill are: (1) Due process of law; (2) Equal protection of the laws; (3) Republican form of government, and (4) Impairment. Of these only the last need be considered, the others being included in it or the same contention having been disposed of by this court in other cases. Impairment is alleged on three grounds: (1) That the water company's contract is impaired by the construction of a municipal plant, there being "fair ground for the contention" that the city should be prohibited from taking its water supply from any other source than that of the defendant company; (2) that the company is

entitled to have its renewal made by ordinance, and section 264-*a* prevents this being done; and (3) that as the city council had the authority to renew the contract prior to the adoption of section 264*a*, that amendment impaired the obligation of the contract by providing that only the "qualified electors" could do so.

The first ground is diametrically opposed to the decisions of this court to the effect that nothing but an express agreement on the part of the city (and not even then unless it has the power to make such agreement), that it will not erect a municipal plant can prevent it doing so. The second ground assumes that the renewal is already made and that only an ordinance evidencing that renewal is necessary. In such case we have shown there is nothing in section 264*a* to forbid such an ordinance being passed, and consequently there can be no impairment (Petitioner's Original Brief, p. 142). The third ground must assume that the renewal has not been made, in which case the granting of a renewal is still discretionary with the city, and substituting the discretion of one body (the qualified electors) to accept an option for that of another (the council) cannot impair the obligation of any contract.

But there is no authority for the water company's contention that the cross-bill must be retained if the bill is dismissed, even though it does state a Federal question. The rule is that when a bill is dismissed the cross-bill must also be dismissed unless it prays affirmative relief *against the original complainant. In this case no such relief is prayed for.*

Once more asking the pardon of the court for filing an additional brief we respectfully submit the case.

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APPENDIX A.

Extracts from Charter of the City and County of Denver.

"ARTICLE IX.

"Public Utilities.

"Acquisition—Petition—Twenty-five Per Cent Voters—Investigation.

"SECTION 252. Whenever a petition signed by qualified electors in number not less than twenty-five per cent of the next preceding vote for mayor, requesting the acquisition of any public utility, work or way, shall be presented to the council, the council shall direct the board of public works to investigate the feasibility of the acquisition of such public utility, work or way, and all costs and expenses which would be incurred by such acquisition, and provide by ordinance for the expense of such investigation and such other expenses as may thereafter be made necessary by any of the provisions hereof.

"Description of Utility—Signatures.

"SECTION 253. The petition shall describe the proposed public utility, work or way, generally, but with sufficient certainty to enable intelligent action thereon, and may be written and signed on any number of sheets.

"Investigation Report.

"SECTION 254. It shall be the duty of the board of public works to comply with the directions of the council and to commence forthwith to carefully investigate whether and how such public utility, work or way, may be acquired, at what probable cost the same may be acquired, and the board shall prepare whatever preliminary specifications, plans and details may be necessary for that purpose; whether, if acquired, it can be operated by the city and county at a profit or advantage, either in quality or cost of service, and after such investigation shall report to the mayor and council, in writing, its findings in the premises, together with all the

facts upon which such findings are based, with sufficient particularity that the mayor and council may judge of the correctness of such findings.

"Legal Opinion of Attorney.

"SECTION 255. If it shall appear from such findings, that such public utility, work or way can be acquired, at what total maximum cost, including all outlays of every nature and kind necessary to complete the same ready for operation, that the same can be operated by the city and county at a profit or advantage in quality or cost of service to the consumers, stating wherein, such profit or advantage consists, and that such public utility, work or way can be paid for out of its net earnings, in not to exceed fifty years, the mayor and council shall obtain and consider the legal opinion of the attorney on all matters of law involved in such proposition.

"Mayor Endorse—Board Prepare Ordinance.

"SECTION 256. The mayor shall thereupon endorse his concurrence or non-concurrence upon the same, and he shall forthwith return the same to the board and the board shall thereupon prepare full specifications, plans and details, if such are necessary, together with a revised estimate of said total maximum cost, and shall prepare and recommend to the council a bill for an ordinance providing for the acquisition of such public utility, work or way, which ordinance shall, among other things, provide the full general description of the proposed public utility, work or way, the said revised total maximum estimated cost thereof, the manner in which such public utility, work or way shall be acquired, whether by purchase, condemnation, construction, or otherwise, and the maximum amount of bonds to be issued and the number of installments and time when such bonds shall mature, and the rate of interest thereon; and shall authorize the acquisition of such public utility, work or way, in the manner so stated and at not to exceed such total maximum estimated cost therein stated, and not otherwise.

"Submission of Ordinance to Tax-paying Electors.

"SECTION 257. Upon the passage of such ordinance the question of whether or not such bonds shall issue, shall be

submitted to the tax-paying electors who shall have paid taxes in the calendar year next preceding, and if a majority of such tax-paying electors voting thereon vote in favor of the issuance of such bonds, such public utility, work or way, shall be acquired under and pursuant to such ordinance, and such bonds shall be issued and such bonds or the proceeds thereof used in payment therefor to the extent necessary; such question shall be submitted at the next general election occurring not earlier than ninety days after the passage of such ordinance, unless the council shall vote in favor of submitting such question at a special election, when it shall be submitted at a special election not earlier than ninety days after the passage of such ordinance. More than one such question may be separately submitted at the same election.

"Cost Paid by Bonds—Sinking Fund.

"SECTION 258. The cost of acquiring any public utility, work or way, shall be paid by bonds of the city and county to be issued as provided by ordinance, but said ordinance shall also provide for a sinking fund for the payment of interest and redemption of bonds as they mature: *Provided*, That the primary liability to pay the interest and principal of said bonds shall remain on the city and county, notwithstanding such sinking fund.

"Bonds Mature in Five to Fifty Years.

"SECTION 259. All bonds issued under the provisions of this article shall mature in equal five-yearly installments, the first installment to mature not earlier than five years and the last installment not later than fifty years from the date of original issue, with interest at not to exceed four per centum per annum, and the principal and interest may be made payable in the city and county and elsewhere, as may be provided in the ordinance providing for the acquisition of such public utility, work or way; said bonds may be used in whole or in part, or may be sold in whole or in part and the proceeds thereof used, as far as required, in the payment for such public utility, work or way, but no such bonds shall be used or sold at less than par, with accrued interest, nor sold except after advertisement, as in this charter provided, for the sale of public improvement bonds, and such bonds and the interest thereon shall be paid by the treasurer, without a warrant from the auditor.

"Treasurer's Accounts With Public Utility.

"SECTION 260. The treasurer shall open a separate account for each public utility work or way so acquired and enter therein all receipts and disbursements on account thereof, and all moneys so received shall be paid to the treasurer, and paid out by him only upon the warrant of the board, audited by the auditor, except as otherwise herein provided.

"Surplus Receipts to Sinking Fund—Redemption and Purchase of Bonds.

"SECTION 261. All surplus receipts from any public utility, work or way so acquired, over and above operating expenses, shall be paid into a sinking fund to be kept by the treasurer on account of such public utility, work or way, and all bonds and coupons shall be paid out of such sinking fund. Whenever there shall be a surplus in the sinking fund in excess of the next installment of maturing bonds and interest on all outstanding bonds to the next interest payment, such surplus may be invested in bonds of the city and county at not above their market value, nor above par with accrued interest, or it may be used in redeeming outstanding bonds maturing at any future period, at not more than their market value, nor more than their par value with accrued interest. As soon as all the outstanding bonds, with interest, shall have been so paid out of the sinking fund, or there shall be sufficient money in such sinking fund to pay the same, principal and interest, the balance remaining in the sinking fund and all net earnings thereafter shall be paid into the general fund, unless some or all thereof shall be needed for improvements or betterments, in which event the council may appropriate the same as may be required.

"Rights of Way—How Acquired.

"SECTION 262. All rights of way and easements which shall be necessary in or about the acquisition of such public utility, work or way, shall be acquired in the manner provided for the acquisition of such rights of way and easements in the case of public improvements, and all condemnation proceedings shall be as provided by law.

"Council Fix Rates.

"SECTION 263. The council shall fix the rates for the service to be rendered by each such public utility, work or way, but, until such public utility, work or way shall have been fully paid, or its payment provided for, by said sinking fund, as aforesaid, such rates shall never be less than sufficient, annually, to pay all cost of maintenance and operation, plus accruing interest on all outstanding bonds, and plus such pro rata amount of the principal of the total issue of bonds as shall be necessary to produce the principal of each installment of bonds as such installments mature, and if during any one year the rates charged shall prove insufficient for such purpose, they shall be increased for the next succeeding year sufficiently to pay such deficiency; and after all of said bonds and interest shall have been fully paid, the rates shall never be less than sufficient to pay for all expenses of maintaining and operating such public utility, work or way."

The History of the Government of Denver with Special Reference to Its Relations with Public Service Corporations.

BY

CLYDE LYNDON KING, Ph. D., etc.

1911.

In the opening of this period, the Denver City Water Company was furnishing through its eighteen miles of street mains, 500,000 to 1,250,000 gallons of water daily. Because of the rapid increase in the population of the city, the increased use of irrigation, which greatly diminished the amount of water in the Platte, and the contamination of the Platte's water by drainage, the company's system had to be enlarged and new sources for water had to be secured. The company planned to build an artificial lake further up the Platte. To carry through this improvement The Denver City Irrigation and Water Company was organized with a capital of $100,000, and with authorized bonds of the same amount. This extension was ready for service by May of 1880, giving the company a total emergency capacity of

9,500,000 gallons daily. The next year other extensions were made. On November 6, 1882, the Denver City Water Company, and the Denver City Irrigation and Water Company were consolidated into the Denver Water Company with the same principals and with Col. Archer still president. The next year the company suffered heavily in the death of Col. Archer, its organizer and executive. From this time on extensions were made, but tardily made. In 1883, the daily capacity of the plant was increased to 16,000,000 gallons. No further extensions and improvements were made for three years thereafter, when the boom of the latter half of the period necessitated both extensions and new sources of water supply.

On March 24, 1886, an auxiliary company, The Domestic Water Company, was incorporated with a capital of $500,000 and with an authorized bond issue of $150,000, to construct a new system of water galleries still farther away from Denver. Within the city, mains were extended and a reservoir constructed on Capitol Hill. The company's next problem was either to extend its mains or to establish new systems in the rapidly growing suburban towns. On April 23, 1887, a franchise for extensions was obtained from Harman. For Highlands a new system was needed. To secure the capital for this purpose, and also to make the most of the opportunity for great financial returns, on July 9, the Beaver Brook Water Company was incorporated, with a capital of $300,000, and $75,000 in bonds. Three days after its incorporation, the company secured from Highlands an exclusive franchise for supplying the village with water, "the scale of prices not to be in excess of The Denver Water Company's prices." Street rights and privileges were also obtained from Denver for the Sixth Ward, the rates "not to exceed those now charged by the company" in Highlands. These rights were limited to twenty years, the city was given the option of purchase at the end of each five year period, and the company had to agree that it would "make no claim for damages against the city" in case it was "in any way finally determined that the Denver City Water Company, or any other corporation, person, or persons, has or have an exclusive right to furnish said city with water." The city was already, though not two decades had passed, beginning to regret its free grants of exclusive franchises. To furnish water to Barnum, another independent village that had sprung up

near Denver, another subsidiary concern, The Mountain Water Company, was incorporated on June 26, 1888, with a capital of $100,000, and $40,000 in bonds. Barnum readily granted the needed franchise. The daily capacity of the Denver Water Company's own plant had in the meantime been increased to 24,500,000 gallons, twentyfold its capacity a decade before, and its capital had been increased to $1,501,000.

This company and its subsidiaries had persistently clung to near-by streams for their water supply. Hence the city's consumption was ever encroaching upon the company's supply of water, especially in times of drought, and the water furnished was ever running greater danger of pollution from new resident sections and increasing danger of depletion by irrigation. A decided demand sprang up in the city for mountain water in lieu of this kind of water which was, said a petitioner to the Supreme Court, "so vile as to preclude the possibility of a comfortable bath" and wholly unfit for domestic purposes. Dissensions arose within the company over the question of a new source for water, and over the question of control, and finally a minority in the company, chief of whom were D. H. Moffat and W. S. Cheesman, issued an ultimatum that they should be given control, or their shares purchased for $450,000. To their confusion the latter proposition was accepted and their connection with the company was thus severed. Thereupon, posing as martyrs for the cause of pure mountain water, and arousing a favorable public opinion by every other possible means, they organized, on March 30, 1889, The Citizens' Water Company, with a capital of $3,000,000. Moffat named himself President and his First National Bank Treasurer. The company at once constructed a separate water system, which brought water from the mouth of the Platte Canon, in the foothills, twenty-two miles away, and by autumn had ready for service a system with a daily capacity of 8,400,000 gallons. On November 22, Denver's council granted the company its needed franchise. As the company was then playing for public favor, it wrote into its franchise many clauses that furthered and protected the interests of the public. This franchise, obtained for the city through the existence of a competitor, and not through any effort on the part of the city aldermen, was the first ever granted in the city that even measurably safeguarded the people's interests. When the Citizens' Company

at last drove out its competitor, it abandoned this franchise for the less liberal one owned by the Denver Water Company. The franchise specifically denied that it was meant to be exclusive, though later abandoned for one that was; the city was given the right to purchase the plant "at any time" after May 1, 1891; existing rates were made the maximum rates; and extensions were required. Franchises were likewise secured from the nearby towns of Barnum, South Denver, Valverde, and Colfax.

With these franchise rights, the Citizens' Company entered into virile cut throat competition with its rival. For two years it abolished all charges for water, giving it away to all comers. Its competitor followed, charging nominal sums only. By 1890 the Citizens' Company was supplying one-third of the water consumers of Denver. Its next move was to encroach upon the exclusive franchise granted by Highlands to The Beaver Brook Company. On March 4, the Citizens' Company asked the Trustees of Highlands to grant it the right to build a main through their town. This the trustees granted but specifically denied to the company all right to furnish water to the town's inhabitants. The next year the company sought to obtain a franchise from Highlands for furnishing water for domestic purposes to the citizens thereof. But the District Court, upon petition of the company holding the exclusive franchise, enjoined the trustees from issuing a franchise to another company. Thereupon the determined trustees granted to Highland residents power to dig trenches in the streets "for the purpose of discovering the water mains of the said Citizens' Company." These mains were soon "discovered" and pipes connected. The District Court ordered these pipes to be disconnected. Appeal was taken to the Supreme Court where the decision of the lower court was reversed. The Citizens' Company had in the meantime been busying itself with extensions elsewhere and with improving its equipment. The combined maximum daily capacity of both competing corporations now totaled over 50,000,000 gallons.

In 1889, the same year that the street railways began to further their ends through the city's council, the water companies likewise entrenched themselves in the city's legislature, never again to release their influence therein.

The Denver Water Company asked for a new franchise. The Citizens' Company tried to prevent the council from passing it but it was adopted early in 1890. Mayor Lon-

doern vetoed it. The council promptly passed it over his veto. Charter amendments affecting the water situation were next proposed in the State legislature and the warring corporations spent $10,000 in legislative bribery.

The provisions of the franchise for the Denver Water Company are of import because this was the franchise under which the Citizens' Company later operated (in lieu of its own all too liberal franchise above described); because many of its provisions have been and are the pretext for many a long fight in State and national courts; and because it is under this franchise that the company is still operating. The franchise was limited to twenty years and its privileges confined to weary pages of streets. The city went on to agree, however, whenever it should be requested to do so, to extend these privileges to any street not named in the franchise. One section of the franchise averred that, as the company was "charged with a public duty, the said city shall pass such ordinances" as were necessary for the protection of the company's water supply operations, and property. What "public duties" did the franchise require the company to perform in return for its rights and privileges? What social interests were safeguarded? The company agreed, "whenever so ordered to do by ordinance duly passed," to extend its mains upon any street where no main existed, *provided* that the city order a fire hydrant "*for every four hundred feet of extension at least*, or fractional part thereof." For its hydrants the city had agreed to pay goodly sums. Not only was no money return asked from the company, but the city actually agreed to double the number of its hydrants and thus *double the amount it paid the company*. By the end of the period the city was annually paying to the company about $55,000; the company was giving the city free water for its *city hall*, its *fire department* and for *sprinkling* purposes. The water supply was to be "of a quality good and fit for private consumption as that shown by the analysis made * * * by Professor Joseph A. Sewall, in the month of August, 1889." This standard said nothing about improvement of quality, prevention of germ pollution, or city inspection and was, therefore, almost wholly valueless. Existing rates and regulations were made the rates and regulations of the future with no power in the city to amend or annul them. And finally, in response to the rapidly growing demand for municipal ownership of the city's water supply, a meaningless,

unenforceable clause was inserted, purporting to give to Denver "all the advantages of municipal ownership with none of its disadvantages." By this clause the company could be required, after it had collected its existing rates for five years more, "to fix schedule rates for private consumers equivalent to the average rate prevailing in the cities of Chicago, St. Louis, and Cincinnati," all of which cities owned their own water systems. This clause, within the following decade, was the center of much municipal and judicial discussion and interpretation. Another clause, now of vital import, provided that, at the expiration of the twenty year period, "in case the city shall then elect so to do, the said works may be purchased by the said city" at a price agreed upon between the city and company or fixed upon by five arbitrators, two to be chosen by the city, two by the company, these four to choose the fifth.

With this franchise The Denver Water Company entered all the more vigorously into the fight. On January 15, 1890, it borrowed $2,500,000. On November 12 following added strategic advantage was sought by consolidating the Denver Water Company and its three auxiliaries, the Domestic, Mountain, and Beaver Brook Water Companies, into The Denver City Water Works Company with an authorized capital of $7,000,000. More money was then borrowed. Four months later, March 31, 1891, this company was reincorporated as The American Water Works Company of New Jersey and its capital increased to $13,000,000.* More free water, then discouragement, then intrigues and treachery, and finally the company defaulted on its interest and, on February 2, 1892, went into the hands of a receiver. Two more years of intrigue, and the New Jersey Company capitulated, leaving its rival, now the Denver Union Water Company by name, triumphant in its struggle for a monopoly on Denver's water supply.

It will be recalled that, at the close of the preceding period, two water companies, The American Water Works Company of New Jersey, whose stockholders were largely non-residents, and The Citizens' Water Company, whose stockholders were

*See J. Warner Mill's account of this, detailed and accurate, in the *Arena*, vol. 34. See also Venner *vs.* Denver Union Water Company, 15 Colo. App., 495, and American Water Works Co. *vs.* Farmers Loan and Trust Co., 20 Colo., 203.

men prominent in local financial and political circles were still battling for supremacy, with the local company ever proving the stronger. On April 8, 1892, a New Jersey court declared the American Water Works Company to be insolvent. In the succeeding two years, numerous "understandings" were reached between The Citizens' Company and the local representatives of the New Jersey Company, including an agreement, signed April 6, 1894, to stop free water and increase rates to those charged by the Denver Water Company in 1890, and an agreement that the property of the New Jersey Company should be sold for $1,010,000, at a perfunctory foreclosure sale to be held April 21, 1894. The purchaser, it is needless to say, was the Citizens' Company, which thereby secured the monopoly for which it had been working since its organization. On October 18, 1894, The Denver Union Water Company was incorporated with the maximum statutory lease of life, twenty years, to take over all the properties of both The Citizens' and the New Jersey Company and also the properties of the South Platte Canal and Reservoir Company. This latter company had been incorporated, in the January preceding, with a capital of $500,000 and $400,000 bonds, to build certain large extensions for the Citizens' Company. The articles of incorporation of the Denver Union Water Company declared that it was created "to acquire by purchase all the property, rights, franchises and privileges, including water works, plant, real estate, personal property, all contracts, choses in action, rights, interests, and assets of the American Water Works Company. . . . The Denver City Water Works Company, The Denver Water Company, The Denver City Water Company, The Denver City Irrigation and Water Company, The Domestic Water Company, The Beaver Brook Water Company, The Mountain Water Company, . . . and the Citizens Water Company. Also to maintain and operate the water works so acquired," make "any and all additions thereto . . . and to construct and equip water works elsewhere and for other corporations" and for any other object or purpose of a kindred nature. The capital stock was $7,500,000, $5,000,000 of which was in common, $2,500,000 in preferred stock. In bonds, $8,000,000 were authorized. Yet the assessed value was but $534,300 in 1895 and $696,305 in 1899. A controlling majority of the stock went to those in The Citizens' Company. All of the stock was to be "full paid and non-

assessable." On January 21, 1895, the company certified to the Secretary of State "that the whole of said capital stock has been issued in payment for property now belonging to said company, and that said property was accepted by said company in full payment for said capital stock." The directors were given complete governmental powers. All the franchises ever granted to any of the nine companies named above, totaling three score in number, became the property of the new concern.

The new company leased from Denver the water plant which had been owned by South Denver, before that town had been annexed to Denver; secured a franchise from Barnum; obtained rights to make extensions in Montclair; and was pushing on to other endowments from the public, when its control was, for four years, questioned by the victory at the polls of those opposed to the public utilities legislating for themselves.

The twenty-year water franchise of 1890 provided that, at its *expiration*, "in case the city shall *then* elect so to do, the said works may be purchased by the said city, and in case the parties cannot agree, *after such election*, upon the price to be paid by the city for the water of said company, its successors and assigns, their fair cash value shall be determined by arbitration, by five disinterested persons, none of whom shall be residents of Denver, two of them to be chosen by the city, two by the company and the fifth by the four first chosen; . . . and upon the payment, or tender of payment, by said city the said company shall convey to said city all of its property, real or personal, easements, rights and privileges." It should be noticed that the choice was to be made at the expiration of the franchise, and that the appraisement was to *follow* the decision for municipal ownership. An association had been organized in 1905 to promote municipal ownership. Its strength and influence had caused the insertion of better clauses in the Tramway and gas franchises voted on in 1906. But the city had in no sense passed upon the municipal ownership of its water plant when in 1907, three years before the expiration of the franchise, the city and the water company reached an agreement whereby, on October 10, five appraisers were chosen in the manner given above, and authorized by ordinance to view, examine, and appraise the property in question. A year and a half thereafter on March 20, 1909, these appraisers reported. They fixed "the fair cash value of the property, business and

rights, . . . which are in any way connected with or related to The Denver Union Water Company, or held by its allied or auxiliary corporations or associations, or persons connected with it, or necessary or useful for its protection, maintenance, or operation, at the sum of $14,400,000." It paid taxes the year thereafter, it must be said, on a valuation of but $2,500,000. Of this $14,400,000, $10,354,075 were assigned to the physical value of the plant, $2,845,925 to the water rights owned by the company, and $1,200,000 for "business and going concern value, . . . and the value of the business during the remainder of the present franchise term."

With the publication of this report, public interest was aroused, to grow ever more intense until the returns of the election, held on May 17, 1910, were fully known. The appraisal was bitterly assailed, especially the value of the water rights and the $1,200,000 allowed for "the value of the business during the *remainder* of the present franchise term," etc., when the purchase value was to be that at the *expiration* of the franchise term. As time passed, and the appraisement, and the company's properties were more maturely considered, the revolt against the appraised value became more and more pronounced. It was vehemently urged that the appraisal was the company's own appraisal, since the city's officials were but the tools of the public utility trust, which had nominated and elected them. That the company had deeply interested itself in every election since the adoption of the charter, and that the leading city officials, the mayor and the majority of the council, were officials wholly acceptable to the water company, are facts that cannot be questioned, and no one at all intimate with Denver affairs has ever denied them.

In effect, two tickets were put into the field for the election of May 17. On the one hand were the party nominees of both the regular Republican and the Democratic party machine, the utility corporations having little or no choice as to which should win; on the other hand were the nominees of the Citizens' party. The former championed the water company's franchise; the latter fought for its rejection.

The water company had put its franchise before the public long before these nominations were made, and it had been and was, until the election was over, subjected to a searching examination, such as no franchise offered in Denver had ever received before.

The franchise provided that consumers could make connections with the company's mains only upon written application, this application to "have printed thereon the reasonable rules of the grantee concerning such connection, the use of water and the payment therefor." This made impossible any appeal for redress after the contract was once accepted. Section three gave to the company "The right to charge" (not "shall not charge over" as in the franchise of 1890) the rates thereto affixed, which were declared to be "just and reasonable charges for such water and service," thus making it impossible to appeal to a court to decide upon the reasonableness of the rates. In 1907 the Supreme Court had declared Judge Le Fevre's rates of 1898, to be "unfair, unjust, and unreasonable" whereupon the company lowered its rates. After the appraisement was made public, rates were again slightly lowered. In these rates the "franchise schedule" made few changes save to increase the company's freedom through the use of maximum and minimum charges. For instance, slaughter houses were to pay anywhere from $20 to $400; soap manufacturers anywhere from $80 to $600. The irrigation rates and the meter rates were likewise solely under the company's control. The standard adopted as to the quality of water the company should furnish, was not one that would be of any value in a court. The water was to be "potable; of a quality suitable for culinary and domestic uses; scientifically treated and filtered, and the equal in quality of the water furnished by the grantee for the past five years." Extensions were to be made as "directed by ordinances," *provided* they should "not exceed ten miles in any calendar year, nor be for less than six hundred contiguous feet." There was no provision by which a consumer could get extensions if he were less than six hundred feet from the mains. Moreover, none of these extensions could be required until the company was "*assured* of an annual revenue" therefrom, "amounting to *not less than five per cent.* of the cost of such material and work." Of this latter fact, none but the company could be the judge, hence, in effect, especially with a friendly city government, no extensions could be required. "During the term of this franchise," read section 16, "the City and County of Denver shall not erect, construct, maintain or operate, any competing plant, or system for the sale and delivery of water nor be directly interested in the same." This clause was inserted with the thought of giving the company an exclusive fran-

chise despite the constitutional and the charter provision that no exclusive franchise could be granted. At the expiration of the franchise, the city was given the right to purchase the company's property "at its fair cash calue," which was to be determined as by the franchise of 1890. The franchise thus gave no protection nor rights to the consumer, no rights whatsoever for inspection by the city, no social compensation in the way of extensions of lower rates. All pecuniary compensation, even, the company sought to evade by a clause that purported to give the city "water and service not exceeding in value $100,000 annually." But included within this "gift," was all the water granted to the city gratis by the franchise of 1890, the only new additions being for new parks and boulevards; hence there would be little, if any, reduction, in the nearly $100,000 that the city annually pays the company for water. No penalty whatsoever was provided for, in case the company violated any of the provisions of the franchise. In short, the company sought to endow itself with valuable rights without making the slightest return for them.

Adverse criticism of the grant became so rife that the Citizens' party, through the initiative provisions of the home rule amendment and charter, by a petition signed by 12,107 qualified electors, nearly twice the ten per cent. required, put before the electorate a charter amendment, amending those provisions of the charter whereby public ownership was made dependent upon a twenty-five per cent. petition and the will of the board of public works, and creating a public utilities commission with all the powers in such premises granted by the charter to the board of public works. This commission was to consist of three members, elected for six-year terms, with a salary of $4,000 annually. The members of the first commission were named in the amendment. To this commission was granted full power to acquire and operate a waterworks system for the city. The City Engineer, John B. Hunter, had given an official report in which he stated that the company's plant could be duplicated for $8,000,000. Through the Citizens' party, another similar investigation was made with like results. The amendment, therefore, gave the commission the power to submit to the electorate for approval $8,000,000 in bonds. If the company elected to take $7,000,000 for its plant, the commission was enjoined to purchase it, the electorate approving, and to use the remaining $1,000,000 in extensions and repairs. If the

company did not wish to sell at $7,000,000, the commission was authorized to submit to the electorate a bond issue of $8,000,000, and, if this was ratified, to proceed to erect therewith, and after its completion operate, a municipal water plant.

Two other amendments were put before the electorate, both purporting to make for municipal ownership, their real purpose being to divide the Citizens' vote. One was a similar charter amendment, creating a public utilities board, the other was a proposition nominally championed by Mayor Speer, denominated "a Business Settlement of the Water Question, removing it from politics, compelling all taxable property, including corporation and vacant property, to pay its proportionate share for a water plant, by creating a non-partisan Commission of Five." As neither of these was considered seriously by any one, least of all by the Mayor, they need not be given further consideration.

The campaign waxed warm indeed, the *News* alone, which championed the Citizens' cause, printing scores of columns upon the issue. The questions that received most attention were the water company's proffered rates and its profits. The rates in all the leading cities were compared with the company's rates. D. H. Moffat, as President of the Water Company, issued several public letters, in one of which he maintained that he had made practically no profit in the water venture. The *News* essayed to prove that, through The Mountain Water Works Construction Company, the water interests had made 242 per cent. on their actual investment, and quoted court records to sustain its contention. Again the water company asserted that, under municipal ownership consumers would have to pay over 50 per cent. more for water than they would under the franchise; the Citizens' defenders marshalled many figures to prove the consumer would pay less. The company contended that by the franchise provisions noted above the city must either buy at the appraised value or grant a new franchise; John A. Rush, Senator Patterson, C. S. Thomas and others cited cases to show that the city need do neither. Then the company urged that the city could not elect to purchase after April 10, the expiration of the old franchise; the Citizens' devotees answered that the city was free to adopt any measure it chose after the old contract had expired. And so the battle waged until the election day on May 17. On [printed Oh] that

day every attempt was made by the Citizens' party, though not with entire success, so many an election worker alleged, to prevent the misuse of funds. A count of the votes revealed that the Citizens' water amendment had won by a vote of 11,582 to 10,076. The company's franchise was defeated by a vote of 15,107 to 9,943. The referendum had proved itself an efficient agent for the rejection of a one-sided franchise.

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FILED
OCT 9 19
JAMES H. McKE

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

No. 642.

THE CITY AND COUNTY OF DENVER, ET AL.,
PETITIONERS,

vs.

THE NEW YORK TRUST COMPANY, ET AL.,
RESPONDENTS.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR RESPONDENT THE NEW YORK TRUST COMPANY.

JOEL F. VAILE,
HENRY MCALLISTER, JR.,
WILLIAM N. VAILE,
Solicitors for Respondent The New York Trust Company.

VAN VORST, MARSHALL & SMITH,
J. MARKHAM MARSHALL,
Of Counsel.

Smith-Brooks [redacted] Press, Denver

SUBJECT INDEX

Page

STATEMENT 1

BILL OF COMPLAINT 3

ARGUMENT 41

STATEMENT OF POINTS 41-45

I. JURISDICTION OF THE COURT 46

(1) **Diverse Citizenship** 46

(a) Applicable legal principles 46

(b) The facts shown by the record 62

(2) **Federal Question** 69

(a) What constitutes a federal question 70

(b) Charter amendment 264A, etc., are laws 73

(c) Any law impairing any contract prohibited 75

II. THE CONTRACT INVOLVED 77

(1) **Under Ordinance 44 of 1890, City required to purchase or renew** 90

(a) That construction required by terms of ordinance and conditions when it was enacted. Same not ultra vires 90

(b) Contemporaneous construction fortifies this conclusion 124

(c) City's conduct estops it from otherwise contending 134

(d) City, having failed to renew, is obligated to purchase. 41 Colo. considered 141

(2) **If Ordinance 44 of 1890 does not require purchase, City bound under Ordinance 163 of 1907** 147

(3) **If no contract to purchase exists, City bound to submit question of purchase to vote** 162

(4) **Effect of charter amendment 264A as an election to purchase** 164

(5) **Obligation of City to pay appraised value, $14,400,000; or value fixed by court** 170

III. THE IMPAIRMENT OF THE CONTRACT 171

(1) **The contract to purchase impaired by section 264A and Ordinance 98 of 1910** 175

(2) **If contract be to submit question of purchase to vote, it is impaired** 200

IV. THE RIGHT OF THE TRUSTEE TO SUE 202

(1) **To protect trust estate from impairment, etc** 204

(2) **Suit not brought alone to recover contents of chose in action; and federal statute inapplicable** 206

(3) **Court, having jurisdiction of suit because of federal question, may decide all matters** 208

Page

(4) Respondent Trust Company, as assignee, may sue for specific performance 211

(5) Certain other objections considered and shown to be baseless 214

(a) The bill not too broad 214

(b) Trustee under South Platte Company mortgage not necessary or indispensable party, etc. 225

(c) No non-performance of contract by Water Company 229

(d) Water Company not estopped by its conduct. 230

V. THE BILL STATES A CAUSE OF ACTION 231

VI. TEMPORARY INJUNCTION NOT IMPROVIDENTLY OR ILLEGALLY ISSUED 237

Table of Cases

Amber vs. Eppinger, 137 U. S., 480 207
Attorney General vs. Detroit, 112 Mich., 145 ..... 243, 244

Baker vs. Humphreys, 101 U. S., 494 137
Barney vs. Baltimore, 6 Wall., 280 226
Beadles vs. Smyser, 209 U. S., 393 ..... 135, 136
Benson vs. San Diego, 100 Fed., 158 204
Blair vs. Chicago, 201 U. S., 400 ..... 47, 51, 66
B'd Co Com'rs vs. Geer, 108 Fed., 478 83
Brewer vs. Blougher, 14 Pet., 178 239
Bristol vs. Bristol etc. Co., 19 R. I., 413 171
Britton vs. Steber, 62 Mo., 370 247
Brock vs. Bruce, 58 Vt., 261 249
Bronson vs. Kinzie, 1 How., 311 172
Browne vs. London Necropolis etc. Co., 6 W. R., 188 211
Buckingham vs. Dake, 112 Fed., 258 208
Bushnell vs. Kennedy, 9 Wall., 387 207
Butler vs. Rockwell, 14 Colo., 125 211

California vs. S. P. Ry. Co., 157 U. S., 229 226
Cameron vs. McRoberts, 3 Wheat., 591 227
Castle Creek W. Co. vs. Aspen, 146 Fed., 8 ..... 100, 114, 169, 171, 234
Cella vs. Brown, 144 Fed., 742 212
Cherryvale W. Co. vs. Cherryvale, 65 Kan., 219 171
Chicago vs. Mills, 204 U. S., 321 ..... 47, 53, 64, 66, 68
Chicago vs. Sheldon, 9 Wall., 50 126
C. R. I. & P. Ry. Co. vs. D. & R. G. R. R. Co., 143 U. S., 596 103
City Ry. Co. vs. Citizens Co., 166 U. S, 557 ..... 70, 71
City Water Supply Co. vs. Ottumwa, 120 Fed., 309 83
Clay Center vs. Clay Center L. & P. Co., 78 Kan., 390 102
Colorado Springs vs. Colo. City, 42 Colo., 75 ..... 83, 86, 135, 136
Cripple Creek vs. Adams, 36 Colo., 320 ..... 84, 86, 96
Cunningham vs. Cleveland, 98 Fed., 657 83

Page
David vs. Portland, 14 Ore., 98 ..... 243, 244
Davis vs. Los Angeles, 189 U. S., 207 74
Dawson vs. Columbia Trust Co., 197 U. S., 178 ..... 61, 187, 188
Denver vs. D. U. W. Co., 41 Colo., 77 ..... 143, 218
Denver vs. Hubbard, 17 Colo. App., 346 ..... 84, 88
Denver vs. N. Y. Trust Co., 187 Fed., 890 ..... 1, 90, 111, 142
Deshler vs. Dodge, 16 How., 621 207
Des Moines vs. Welsbach Co., 188 Fed., 906 83
Detroit vs. Detroit Ry. Co., 56 Fed., 867 126
Dickerman vs. Northern T. Co., 176 U. S., 181 ..... 47, 49, 66
Dickerson vs. Colgrove, 100 U. S., 578 ..... 137, 138
District of Columbia vs. Gallaher, 124 U. S., 505 126
Doctor vs. Harrington, 196 U. S., 579 47
Duluth vs. Duluth G. & W. Co., 45 Minn., 210 ..... 97, 99

Elmendorf vs. Taylor, 10 Wheat., 152 227
El Paso & N. E. Ry. vs. Gutierrez, 215 U. S., 87 198

Farmers L. & T. Co. vs. Sioux Falls, 131 Fed., 890 205
Farrington vs. Tennessee, 95 U. S., 679 174
Fletcher vs. Peck, 6 Cranch, 87 75

Galena vs. Amy, 5 Wall., 705 113
German Sav. Inst. vs. Delavergne Co., 70 Fed., 146 230
Grant vs. Beronio, 97 Cal., 496 227
Green vs. Biddle, 8 Wheat., 1 172
Greenleaf vs. Queen, 1 Pet., 138 226
Guardian T. Co. vs. White Cliffs etc. Co., 109 Fed., 523 204
Guild vs. A. T. & S. F. Co., 57 Kan., 70 227

Helm vs. Zarecor, 222 U. S., 32 60
Henry vs. Mason City etc. Co., 140 Ia., 201 126
Hilts vs. Arnold (unreported) 244
Holy Trinity Church vs. U. S., 143 U. S., 457 239
Horner vs. U. S., 143 U. S., 570 208
Hudson vs. Max Meadows Co., 97 Va., 341 227
Hunt vs. Smith, 139 Ill., 296 227

Illinois Cent. R. R. Co. vs. Adams, 180 U. S., 28 70
Illinois Cent. R. R. Co. vs. Chicago, 176 U. S., 646 ..... 70, 72
Illinois T. & S. Bank vs. Arkansas City, 76 Fed., 271 ..... 82, 99, 104, 126, 135, 140

J. J. McCaskill Co. vs. U. S., 216 U. S., 594 224
Jewett vs. Bradford, 45 Fed., 801 208
Johnson vs. St. Louis, 172 Fed., 31 205
Jones vs. Mo. Elec. Co., 144 Fed., 765 204

Kauffman vs. Raeder, 108 Fed., 171 230
Kentucky Distilleries Co. vs. Blanton, 149 Fed., 31 227
Kirk vs. Hamilton, 102 U. S., 68 ..... 137, 139
Knickerbocker T. Co. vs. Kalamazoo, 182 Fed., 865 205
Knoxville Water Co. vs. Knoxville, 200 U. S., 22 ..... 72, 80

Page

Leadville Illuminating Co. vs. Leadville, 9 Colo. App., 400..... 84, 89
Leather etc Bank vs. Morgan, 117 U. S., 96..... 137
Lenman vs. Jones, 222 U. S., 51..... 212
Linn etc. Co. vs. U. S., 196 Fed., 593..... 224
Little Falls Co. vs. Little Falls, 102 Fed., 663..... 83
Lockhart vs. Leeds, 195 U. S., 427..... 78, 79
Los Angeles vs. Los Angeles Water Co., 177 U. S., 558..... 97, 99
Los Angeles City Co. vs. Los Angeles, 88 Fed., 720.....83, 98, 99, 103
Los Angeles City Co. vs. Los Angeles, 103 Fed., 711..... 83
Louisiana vs. New Orleans, 102 U. S., 203..... 175
Lowrey vs. Hawaii, 206 U. S., 206..... 126

McCracken vs. Hayward, 2 How., 608..... 173
McCullough vs. Sutherland, 153 Fed., 418..... 227
McKee vs. U. S., 164 U. S., 287..... 239
May vs. Le Claire, 11 Wall., 217..... 233
Mayor vs. Swink, 96 Tenn., 564..... 241
Mechanic's Bank vs. Seton, 1 Pet., 298..... 227
Mercantile T. Co. vs. Columbus, 203 U. S., 311.....69, 70, 72, 74, 191, 204
Mercantile T. Co. vs. T. & P. Ry. Co., 51 Fed., 529..... 204
Merriam vs. U. S., 107 U. S., 437..... 103
Metropolitan Ry. Receivership, 208 U. S., 90.....47, 58, 66
Mills vs. Chicago, 143 Fed., 430..... 54, 66
Mitchell vs. Moore, 95 U. S., 587..... 79
Morgan vs. Railroad Co., 96 U. S., 716.....137, 138
Murray vs. Charleston, 96 U. S., 432..... 175

National Water Works Co. vs. Kansas City, 62 Fed., 853.....79, 81, 97
National Water Works Co. vs. Kansas City, 78 Fed., 428..... 225
New Orleans W. Co. vs. Louisiana Co., 125 U. S., 18..... 74
New Orleans W. Co. vs. Rivers, 115 U. S., 674..... 100
New York T. Co. vs. Michigan, 193 Fed., 175..... 205
Northern Pac. Co. vs. Duluth, 208 U. S., 583.....74, 77, 191, 192
Northwestern etc. Co. vs. Keith, 77 Fed., 374..... 113

Ober vs. Gallagher, 93 U. S., 199..... 209
Old Colony T. Co. vs. Wichita, 123 Fed., 762..... 205
Omaha vs. Omaha W. Co., 192 Fed., 246.....227, 228
Omaha vs. Omaha W. Co., 218 U. S., 180.....219, 221
Omaha Water Co. vs. Omaha, 147 Fed., 1..... 83
Omaha Water Co. vs. Omaha, 156 Fed., 922..... 230
Omaha Water Co. vs. Omaha, 162 Fed., 225..... 219

Pacific Elec. Ry. Co. vs. Los Angeles, 194 U. S., 112..... 70, 72
Penna. R. Co. vs. St. Louis etc. Co., 118 U. S., 290..... 233
People vs. Conover, 17 N. Y., 64..... 249
People vs. Curley, 5 Colo., 412..... 243
People's Gas Co. vs. Chicago, 194 U. S., 1..... 223
Petri vs. Bank, 142 U. S., 644..... 239
Pike's Peak Power Co. vs. Colo. Springs, 105 Fed., 1.....83, 84, 96
Planters Bank vs. Sharp, 6 How., 301..... 173
Preble vs. Abrahams, 88 Cal., 245..... 227

	Page
Railroad Co. vs. Mississippi, 102 U. S., 135	208
Railroad Co. vs. Pennsylvania, 15 Wall., 300	175
Reagan vs. Farmers L. & T. Co., 154 U. S., 362	47, 77, 204
Safety Insulated W. Co. vs. Mayor, 66 Fed., 140	82
St. Charles vs. Stookey, 154 Fed., 772	230
St. Louis vs. Laclede etc. Co., 155 Mo., 1	126
St. Paul Gas Light Co. vs. St. Paul, 181 U. S., 142	74, 187, 188, 192
Scott vs. U. S., 12 Wall., 443	103
Shapleigh vs. San Angelo, 167 U. S., 646	190
Shawnee Sewerage Co. vs. Stearns, 220 U. S., 462	187, 188, 189
Shields vs. Barrow, 17 How., 129	227
Siler vs. L. & N. R. R. Co., 213 U. S., 175	208
Slocum vs. North Platte, 192 Fed., 252	227, 228
South Dakota vs. North Carolina, 192 U. S., 286	47
Southern etc. Co. vs. Mobile, 162 Fed., 523	83
Speer vs. B'd Co. Com., 88 Fed., 749	83
State vs. Burns, 38 Fla., 368	249
State vs. Dillon, 90 Mo., 229	248
State vs. Valle, 41 Mo., 29	243, 246
Stein vs. Bienville Water Sup. Co., 34 Fed., 145	97
Stein vs. Bienville Water Sup. Co., 141 U. S., 67	97
Stephens vs. McCargo, 9 Wheat., 502	204
Stratton's Independence vs. Dines, 135 Fed., 449	224
Strickland vs. Barber, 76 Mich., 310	227
Supervisors vs. U. S., 4 Wall., 435	113
Tayloe vs. Merchants F. I. Co., 9 How., 390	79
Texas vs. Hardenberg, 10 Wall., 68	79
Texas Oil Co. vs. Central Fuel Co., 194 Fed., 1	212, 225
Topliff vs. Topliff, 122 U. S., 121	125
Tyler vs. Savage, 143 U. S., 79	79
Union Pac. Ry. Co. vs. C. R. I. & P. Ry. Co., 163 U. S., 564	224
U. S. vs. Cornell Steamboat Co., 202 U. S., 184	113
U. S. vs. Gibbons, 109 U. S., 200	103
U. S. vs. Smith, 181 Fed., 545	224
U. S. vs. U. P. Co., 91 U. S., 72	104
Venner vs. Gt. Northern Ry. Co., 209 U. S., 24	47
Vicksburg Water Works Co. vs. Vicksburg, 185 U. S., 65	191, 194, 199
Village of Kent vs. U. S., 113 Fed., 232	113
Von Hoffman vs. Quincy, 4 Wall., 535	174, 186
Walden vs. Bodley, 14 Peters, 156	79
Walker vs. Brown, 165 U. S., 654	103
Walla Walla vs. Walla Walla Co., 172 U. S., 1	74, 81, 232
Waterman vs. Canal etc. Bank, 215 U. S., 33	226
Westinghouse Co. vs. K. C. R. Co., 137 Fed., 26	204
Willard vs. Tayloe, 8 Wall., 557	212
Willey, *ex parte*, 54 Ala., 226	249
Williamson vs. U. S., 207 U. S., 425	208
Willis vs. B'd Com., 86 Fed., 872	82
Winona vs. Botzet, 169 Fed., 321	83
Wykes vs. City Water Co., 184 Fed., 752	83
Yazoo etc. Co. vs. Adams, 180 U. S., 1	70

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

No. 642.

THE CITY AND COUNTY OF DENVER, ET AL.,
PETITIONERS,

vs.

THE NEW YORK TRUST COMPANY, ET AL.,
RESPONDENTS.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR RESPONDENT THE NEW YORK TRUST COMPANY.

STATEMENT.

The decrees brought before this court for present review on the writs of certiorari granted in the above-entitled cause and in its companion case numbered 643, were entered by the Circuit Court of Appeals for the Eighth Circuit on May 19, 1911 (Printed Record, p. 348), on its opinion rendered on the same day (Record, p. 335; 110 C. C. A. 24, 187 Fed., 890). These decrees affirmed interlocutory orders of in-

junction entered on September 6, 1910, by the Circuit Court of the United States for the District of Colorado, in favor of the present respondent, The New York Trust Company, which was complainant in said court, and The Denver Union Water Company (hereinafter sometimes called the defendant Water Company), which was a defendant and cross-complainant therein, against the City and County of Denver (hereinafter called the defendant City) and certain of its officers, who are the petitioners at bar (Record, pp. 270, 272). These injunctive orders restrained the present petitioners, until the further order of the court, from issuing $8,000,000 of bonds of the City, or any amount thereof, under the pretended authority of a charter amendment known as section 264A, or of an election held in pursuance thereof, for the construction of a new, independent, municipal water plant, or from taking any steps toward the construction of such plant.

Thereafter the mandates were issued by the Circuit Court of Appeals and filed in the Circuit Court. The pleadings and issues were made up in that court, a large amount of testimony was taken therein, and in April of the present year the final hearing occurred, elaborate oral arguments were made, and the cause submitted for final decree. Then, and not until then, did the defendants, now petitioners, apply to this court for writs of certiorari to review the decrees of the Circuit Court of Appeals; the petition therefor being filed only a few days before the expiration of the year following that court's opinion. (Respondent's brief in opposition to the petition for the writs.)

We are now concerned solely with the record upon which the injunctions were granted and affirmed.

The bill of The New York Trust Company (hereinafter sometimes called the complainant) was filed in the Circuit Court on August 22, 1910 (Record, p. 2); the answer and cross-bill of the defendant Water Company were filed on August 25, 1910; and the hearings on the applications of the complainant and cross-complainant for injunctions began on August 31, 1910, and were concluded with the injunctive orders on September 6, 1910. None of the present petitioners filed any answer or other pleading to either bill or cross-bill, both of which were duly verified. Therefore all allegations of material facts embodied therein were and must be deemed and taken to be true, unless they are controverted by certain affidavits presented at the hearing. Such affidavits, however, do not in any wise refute the allegations of the bill, but, on the contrary, lend material substantiation to the case of this respondent. We shall have occasion to refer to the facts appearing by these affidavits at the appropriate places in the brief, and shall now confine ourselves to an outline of the bill of complaint.

THE BILL OF COMPLAINT (RECORD, P. 2).

This bill was filed by the respondent Trust Company, as trustee under the mortgage of The Denver Union Water Company, dated October 20, 1894, securing an issue of $8,000,000 of its bonds, and conveying all of its property, rights, privileges, franchises, etc., present or after-acquired (Record, p. 42). The complainant was a citizen of New York, and all the defendants, including the Water Company and its subsidiary, The South Platte Canal and Reservoir Company, were citizens of Colorado.

After alleging such citizenship and the official positions in the defendant City held by individual defendants, and that

> "the amount in this controversy exceeds, exclusive of interest and costs, the sum or value of five thousand dollars, and this is a controversy wholly between citizens of different states, * * *; and this is a suit of a civil nature in equity, arising under the constitution and laws of the United States, to-wit: those provisions of the Constitution of the United States and the amendments thereto hereinafter specifically mentioned and referred to" (Record, pp. 3-4),

the bill averred the following facts and matters:

Prior to October 18, 1894, there was embraced within the territory now constituting the defendant City a number of incorporated municipalities, including the old City of Denver, and the towns of Barnum, Colfax, Harman, Highlands, South Denver, Argo, Berkeley, Elyria, Globeville, Montclair and Valverde. (The location and boundaries of these city and towns are shown on the map inserted at page 235 of the printed record.) Between 1870 and 1894 numerous specified corporations had been organized and engaged in supplying the said municipalities and their inhabitants with water under ordinances granted by the respective incorporated communities. Among the ordinances and contracts so made was Ordinance No. 44 of the Series of 1890 of the ordinances of the City of Denver, which was the principal municipal corporation afterwards consolidated into the City and County of Denver. (Record, p. 4.)

This ordinance became effective on April 10, 1890. The grantee therein was The Denver Water Company. The ordinance, which constitutes the foundation of this respondent's cause of action, is set forth as Exhibit A to the bill. (Printed Record, p. 31.)

By the terms of this ordinance (section 1) the right and privilege of laying down, continuing and maintaining water pipes, etc., in, under and along designated streets, avenues, alleys and public places was granted to the said The Denver Water Company

> *"to such extent as the city may lawfully grant the same, subject to be terminated in the manner hereinafter in this ordinance provided."* (Record, p. 34, fol. 63.)

Section 2 thereof made a similar grant "to such extent as it [the City] lawfully may" as to streets thereafter laid out, and provided:

> "[The City of Denver] will also, whenever requested, make such additional and confirmatory grants to said The Denver Water Company, its successors and assigns, of the rights and privileges mentioned in section 1 hereof, as it may at the time have the lawful right and power to make; all of such further additional and confirmatory grants, if made, *to be subject to termination in the manner in this ordinance hereinafter specified."*

The only provisions of the ordinance respecting its termination are found in sections 11 and 12, which are as follows:

"Sec. 11. At the expiration of the period of twenty years from and after the date of the passage and approval of the ordinance, in case the city shall then elect so to do, the said works may be purchased by the said city, and in case the parties cannot agree, after such election, upon the price to be paid by the city for the water works of the said company, its successors and assigns, then their fair cash value shall be determined by arbitration, by five disinterested persons, none of whom shall be residents of Denver, two of them to be chosen by the city, two by the company, and the fifth by the four first chosen, and in case of failure on the part of the company to name arbitrators for the period of thirty days after the city shall have named arbitrators and notified the company so to do, the city may apply to any court having equity jurisdiction in the county in which the city of Denver shall then be situated for the appointment of two persons of the qualifications aforesaid as such arbitrators, and the court may thereupon appoint two such persons, who shall act with the same force and effect as if appointed by the company, and the decision of a majority of said board shall be final and binding upon both parties, and upon the payment, or tender of payment, by said city the said company shall convey to said city all of its property, real and personal, easements, rights and privileges, and

thereafter all franchises, rights and privileges which have been at any time theretofore granted said company, its successors or assigns, and which it may then possess, shall cease and be at an end.

Sec. 12. At the expiration of the said period of twenty years the said city may, at its election, renew the contract hereby made, by ordinance to that effect, for a like period of twenty years, but at a price for hydrant rental 10 per cent. less than mentioned in section 10 hereof, for the period remaining after the ten years after May 1st, 1891, and for successive periods of twenty years at the price last aforesaid, as often and as long as the city may choose. This section is conditioned, however, upon the full performance by the city of the provisions of section 2 hereof." (Record, pp. 36, 37.)

Sections 19 and 20 of the said ordinance provided as follows:

"Sec. 19. This ordinance, when the same shall be in writing accepted by The Denver Water Company, becomes a contract between the City of Denver and the said The Denver Water Company, its successors and assigns, and the same shall as to every provision herein contained as fully bind and inure to the benefit of the successors and assigns of the said The Denver Water Company as to the said company. And it is expressly understood that by the acceptance of this ordi-

nance the said The Denver Water Company loses no rights in regard to the occupation of the streets, alleys and public places, or as to the rights of any other person or persons thereto which it now possesses, but the same are hereby recognized and confirmed and are to be deemed independent of and not merged in any grant in this ordinance elsewhere contained.

Sec. 20. All mains, pipes, valves and other apparatus now owned by said The Denver Water Company, and composing its plant, and all such mains, pipes, valves, hydrants and other apparatus as said The Denver Water Company, its successors or assigns, shall hereafter lay down or set in or upon any of the streets, alleys or other public places within said city *shall be and remain the sole and absolute property of said The Denver Water Company, its successors and assigns,* and the said The Denver Water Company, its successors or assigns, *shall forever be considered and entitled to be in possession thereof, except in case of purchase by said city under the terms of this ordinance,* or some agreement between said city and said company, its successors or assigns, when all rights of whatsoever nature of said company, its successors or assigns, in and to the subject-matter hereof shall vest in said city." (Record, pp. 38, 39. Italics ours.)

Between October 18 and October 20, 1894, the defendant The Denver Union Water Company acquired by purchase all of the property and plant used

for the distribution of water now comprised in the City and County of Denver, including all of the franchises and contracts theretofore belonging to all companies engaged in supplying said city with water, and including, among others, the said Ordinance 44 of the Series of 1890, and all of the rights and franchises thereby granted, and that thereupon the defendant Water Company became the assignee of The Denver Water Company with respect to said Ordinance 44. (Record, p. 5.)

On October 20, 1894, the defendant Water Company, being the owner of all of such property, including said Ordinance 44, made, executed and delivered to The Continental Trust Company of the City of New York (to which company the respondent, The New York Trust Company, has succeeded), as trustee, its certain mortgage or deed of trust to secure an issue of eight million dollars of the first-mortgage bonds of the Water Company, and that said mortgage is still outstanding and secures the payment of said issue of bonds, all of which were sold and negotiated and the proceeds used in the acquisition, construction and extension of the waterworks plant, and have been for many years outstanding in the hands of purchasers for value. (Record, p. 5.)

A true copy of this mortgage is attached to the bill as Exhibit B (Record, p. 42), and as it is the instrument creating this respondent's interest in the present controversy, we call attention to the fact that by its granting clauses (Printed Record, pp. 52 *et seq.*) the Water Company.

> "hath granted, bargained, sold, released, remised, enfeoffed, conveyed and confirmed, and by these presents doth grant, bargain,

> sell, release, remise, enfeoff, convey and confirm, unto the said party of the second part, its successors and assigns, as such trustee, for the uses and purposes, and subject to the conditions and trusts hereinbefore and hereinafter expressed, *all its privileges, franchises, easements*, choses in action, estate, property, real and personal, water works, pipes, mains, valves, hydrants and other apparatus, and all extensions and enlargements thereof," etc.

The mortgage also granted, conveyed and confirmed unto the trustee

> "all rentals, debts, dues, demands, choses in action of every kind and nature, including water rents, from the City of Denver (and other municipalities named) * * * in and by virtue of any contract or contracts, resolution or resolutions, ordinance or ordinances of said city * * * now in force, or which may be hereafter in force, * * * and also all the estate, privileges, franchises, easements, choses in action, property, real and personal, effects and assets which the said first party (the Water Company), its successors and assigns, may at any time hereafter during the existence of this instrument and the lien thereof, acquire at any place whatsoever, for any purpose for which the said corporation, its successors or assigns, shall be authorized by its or their articles of incorporation or charter to own, have, possess or acquire." (Record, p. 52.)

Anticipating a purchase by the City of Denver, or its successor, of the water plant covered by the mortgage, under the provisions of section 11 of Ordinance 44 of 1890, section twentieth of the mortgage provided as follows:

> "*Twentieth:* In case the City of Denver shall have a right to purchase the works and property of the first party, situated within its corporate limits, on the tenth day of April, 1910, and in case of such purchase, if the first party shall be obliged to deliver the property of the first party so purchased to the said City of Denver, free and clear of all incumbrances; and it shall be necessary to pay off and redeem the whole of the indebtedness secured by this instrument, it is agreed that all the moneys to be received by the said first party from the said City of Denver on account of said purchase shall be payable to the said second party directly from the City, and the same are hereby assigned to the said second party, for the purposes of the trusts by this instrument created." (Record, p. 61.)

It will thus be seen that the mortgage conveyed in the broadest possible language all franchises and contract rights of every character then owned by the Water Company or thereafter to be acquired by it, including all rights and privileges conferred by Ordinance 44 of 1890, and including specifically the right to receive the purchase price of the water plant in event of its sale to the City under Ordinance 44 of 1890.

The bill avers that the present respondent, The New York Trust Company, has succeeded to the trusteeship under this mortgage, having accepted the trusts thereby conferred,

> "and in and by said mortgage or deed of trust your orator has an estate in and a lien upon all property, real, personal and mixed, of the defendant Water Company and all of its rights, franchises, privileges and contracts, including all rights, privileges and contracts granted and entered into by and under the aforesaid ordinance No. 44 of the Series of 1890, and all of the revenues of the defendant Water Company to secure and insure the payment of all of said bonds and the interest thereon." (Record, p. 7.)

Ever since the date of the execution of such mortgage, the Water Company has been the owner, subject to the mortgage, and in possession and control of all of the water plant and water rights, franchises and contracts formerly belonging to the predecessor companies, including Ordinance 44 of 1890, all of which were and now are used and necessary to be used for the supplying of water to the City and County of Denver and its inhabitants. Such waterworks system of the Water Company is the sole means and source of supply for water for any of said purposes, and such water and the supply thereof in constant, uninterrupted and adequate quantities are all essential to the protection and welfare of the inhabitants of the City and County of Denver. Since the execution of the mortgage the population of said city has

greatly increased, now amounting to more than 200,000, and by reason thereof it has been necessary for the Water Company to expend very large sums of money—to-wit, more than five million dollars—in the acquisition of additional property, and in the enlargement and extension of its old works—all since the execution of such mortgage. The situation of the City in an arid or semi-arid region is then averred, and it is stated that the supply of water furnished by the mountain streams is extremely limited in quantity, and that the uses and demands therefor are unlimited and constantly increasing; that for these reasons water is a commodity having an ascertained value, and that it has been necessary for the Water Company to anticipate at least twenty years in advance the needs of the City and County of Denver for water, in order that its future growth might not be impeded. By reason of the variable flow of water in the natural streams upon which the City is dependent, it has been necessary for the Water Company to construct large storage reservoirs on the head-waters of said streams. Among these reservoirs is what is known as the Cheesman dam and lake. As an aid in the construction of such reservoir, the Water Company caused to be incorporated the defendant, The South Platte Canal and Reservoir Company, all of whose capital stock has ever since been and now is owned by the Water Company; and acting under the control of the Water Company, and by the expenditure of large sums of money obtained and furnished by it, the South Platte Company has constructed such Cheesman dam and lake on the South Fork of the South Platte River. This has a capacity of over 25,000,000,000 gallons, and at the time of the filing of the

bill contained nearly that amount of water, being a sufficient amount to supply the defendant City for a long time to come without replenishment from any source. The said South Platte Company under the direction and control of the Water Company has also acquired and owns a large amount of other property, including water rights, filter beds and like holdings, all of which are an essential part of the waterworks system of the Water Company. In order to obtain funds for such construction and acquisition, the South Platte Company authorized an issue of its bonds in the sum of four million dollars, dated July 1, 1903, payable twenty years after date, but providing that they should be redeemable at the option of the South Platte Company at any time during the year beginning April 10, 1910, and ending April 9, 1911; and to secure the payment thereof executed and delivered to a trustee its deed of trust or mortgage in all its property. The Water Company agreed to and did guarantee the payment of both principal and interest of such bonds, all of which are now outstanding. On May 1, 1903, the South Platte Company entered into a lease with the Water Company whereby it leased to the latter for the period of twenty years from and after July 1, 1903, all of its property and rights of whatsoever character, including said Cheesman dam and lake, and the right to the use of all waters impounded or to be impounded therein, and ever since said date the Water Company has been and now is in full possession, control and use of such property. (Record, pp. 7-9.)

The defendant City is the successor to the City of Denver and the other municipalities. By virtue of

Article XX of the Constitution of the State of Colorado, the defendant City succeeded to all the rights and liabilities, and assumed all of the obligations of the former City of Denver with respect to its ordinances, contracts and agreements, including said Ordinance 44 of the Series of 1890; and the bonds issued by the Water Company and the South Platte Company were sold by them and acquired by the purchasers in reliance on the belief that the contract obligations of the defendant City and its predecessors would be faithfully performed and observed. (Record, p. 9.)

Ordinance 44 at all times has constituted, and now does constitute, the contract between the Water Company and the defendant City with reference to the supply of water for all purposes to the major portion of the territory included within the limits of the defendant City, and also the contract with reference to the acquisition by the defendant City of the waterworks and plant of the Water Company; and such ordinance was the principal inducement to the acquisition by the Water Company of the said water plant, and its enlargement and improvement, and the investment of the large sums of money therein, and such contract

> "now constitutes in very large measure the security upon the faith of which the aforesaid bonds of the defendants Water Company and South Platte Company were issued and sold and the moneys of the purchasers thereof invested therein, and unless the terms and provisions of said ordinance and contract and all thereof shall be faithfully

observed and fully carried out by the defendant City the security of the bondholders for whom your orator is trustee under said deed of trust will be very greatly impaired and such bondholders subjected to great loss and damage." (Record, p. 10.)

Sections 11, 12 and 20 of said Ordinance 44 of 1890, hereinabove quoted, are then set forth in the bill, it being alleged that such ordinance fixed no date for the termination of the rights and privileges thereby granted except as provided in such sections.

The Water Company has at all times complied with the provisions of such ordinance, and all of the property, franchises and rights of all preceding water corporations were purchased by the Water Company and added to the former plant of The Denver Water Company, the original grantee in said ordinance—all for the purpose of supplementing, amplifying and perfecting the waterworks and plant formerly belonging to The Denver Water Company, and in order that the same might be proper and sufficient for the purpose of supplying water to the defendant City; and all of the reservoirs, distributing systems and other property, whether standing in the name of the defendant Water Company or the defendant South Platte Company, and owned by them respectively, are all inseparable and integral portions of the same waterworks system, and all of them together constitute the waterworks and property referred to and contemplated to be purchased by the City under and by virtue of the terms of section 11 of Ordinance 44 of the Series of 1890. (Record, p. 12.)

Heretofore and shortly prior to the 2nd day of October, 1907, the Water Company, at the instance of the defendant City, agreed to waive, and, so far as it was empowered so to do, did waive, the provision contained in section 11 of Ordinance 44 of the Series of 1890, to the effect that the defendant City, as successor to the City of Denver, could not purchase the waterworks and plant, or cause an appraisement thereof to be made for that purpose, until the expiration of the period of twenty years from and after April 10, 1890; and thereupon at the instance of the defendant City, and with the consent of the Water Company, Ordinance 163 of the Series of 1907 was approved October 2, 1907, and is now in full force and effect, so far as in law it may be effective in view of the contract relations then and theretofore existing between the defendant City, the defendant Water Company, and the complainant trustee and the holders of the bonds secured by said mortgage. (Record, p. 12.)

A copy of such ordinance, marked "Exhibit C," is attached to the bill and appears at page 69 of the Record.

In and by said ordinance it was contemplated that a contract should forthwith be entered into between the defendant City and the defendant Water Company (which was done), in substance that the defendant City should be and was granted the privilege of causing the appraisement contemplated by section 11 of Ordinance 44 of 1890 to be made forthwith, and at a date prior to the expiration of the period of twenty years specified in said Ordinance 44, and that the defendant City should and did then and thereby elect to purchase said waterworks system and plant,

which were fully identified in said Ordinance 163 of 1907, at the appraised price, unless it should grant to the defendant Water Company a new franchise differing in its terms from Ordinance 44 of the Series of 1890, all as contemplated by and set forth in said Ordinance 163 of 1907. (Record, p. 13.)

Said ordinance, and the contract made in pursuance thereof, provided that under and in accordance with and in the manner specified in section 11 of Ordinance 44 of 1890, five appraisers should forthwith be appointed, for the purpose of appraising the water system and plant, as more fully specified in section 11 of Ordinance 44 of 1890, and in Ordinance 163 of 1907, which appraisement was by the terms of the last-named ordinance to be binding and conclusive upon the defendant City and the defendant Water Company. The appraisers were John R. Freeman, of Providence, Rhode Island; C. L. Harrison, of New York; Frederick P. Stearns, of Boston; Allen Hazen, of New York, and M. L. Holman, of St. Louis. The bill avers the manner of selecting these appraisers, each of whom was a non-resident of Denver, and a man of the highest degree of experience in such matters, and wholly disinterested and impartial. The appraisers named by the City were selected after its mayor had submitted their names to various commercial organizations for the purpose of ascertaining if there were any objections to them. It is averred that, after the appointment and designation of the appraisers or arbitrators, they duly qualified as such, and proceeded to make an appraisement of all of the property and plant constituting the waterworks of the defendant Water Company, and conducted full hearings for that purpose, at which both parties were represented.

Personal examinations and investigations were made by the arbitrators or appraisers, and after an impartial investigation, covering a period of about eighteen months, they did, on the 20th day of March, 1909, find and determine, and so announced, that the value of said property as of the date of the appraisement was the sum of $14,400,000; which amount, however, was subject to certain equitable adjustments between the parties as of the date of actual purchase, and relating to changes, if any, which might have occurred since the date to which said appraisement referred, particularly as to the stock of material on hand. (Record, pp. 13-14.)

The defendant City has never since the date of the passage and approval of said Ordinance 163 of 1907 granted to the defendant Water Company any new franchise or made any new contract, as contemplated in said Ordinance 163 of 1907, nor has it offered so to do. And by reason of the acts and transactions alleged in the bill, there is a binding election by and firm obligation upon the defendant City to purchase the waterworks and property for and at the appraised value of $14,400.000, subject to the adjustments specified by the appraisers, in accordance with the existing contract contained in said Ordinance 44 of 1890. But, notwithstanding such obligation, the defendant City wholly disregards the same, and with the object and intent of obtaining the property at much less than the appraised value, and of forcing the complainant Trustee, as well as the holders of the bonds secured thereby, to part with their interests in said property at a great and ruinous sacrifice, and at much less than the total amount of the debt evidenced by said bonds and secured by said

mortgage, the defendant City has refused to complete said purchase or pay for said property at the appraised value, and it has not offered so to do. On the contrary, immediately following such appraisement, the defendant City entered upon an unconscionable and inequitable course of conduct, intended to depreciate the value of the property for purposes of sale or transfer, to deprive the complainant Trustee and the bondholders and the defendant Water Company of their property without due process of law, and to impair the obligation of existing contracts between them, and to so embarrass, hinder and impede the complainant trustee and the bondholders and the Water Company, in respect to their rights under Ordinance 44 of 1890, as eventually to force them to part with their respective interests in the property at much less than the appraised value, and at such a ruinous, inadequate and insufficient price as not to cover or discharge the amount of debt secured by the mortgage to complainant trustee. (Record, pp. 14-15.)

In pursuance of such wrongful and dishonest purposes, the defendant City claims and pretends that the aforesaid appraisement was, and was intended to be, experimental and tentative only, and that the defendant City, after having determined the value of the waterworks system and plant, as contemplated by section 11 of Ordinance 44 of 1890, might, if satisfied therewith, elect to purchase the plant at the appraised value, or, if dissatisfied, refuse to purchase. It is averred, however, that Ordinance 163 of 1907 is not, and cannot within constitutional limitations be, so construed; but, on the contrary, if such construction of said ordinance were correct, the same would be a manifest and prejudicial impairment of the prior ex-

isting contract between complainant (now respondent) as trustee and the holders of the bonds, on the one part, and the defendant City, on the other, and particularly of that portion of said contract contained in section 11 of Ordinance 44 of the Series of 1890; which impairment would be and is prohibited by section 10 of Article I of the Constitution of the United States, as well as by the Constitution of the State of Colorado, and would deprive the complainant as trustee, and said bondholders, of their property, without due process of law, contrary to the provisions of the fourteenth amendment to the federal Constitution and section 25 of Article II of the Colorado Constitution. The true meaning and intent of said Ordinance 163 of 1907 was and is that the defendant City should be and was granted the privilege of causing the appraisement to be made at a date prior to the expiration of the period of twenty years specified in Ordinance 44, and that the defendant City should and did thereby elect to purchase said waterworks system and plant at the appraised value, unless it should grant to the defendant Water Company such new franchise or contract, which it has failed and refused to do. (Record, p. 16.)

Since the appraisement was made, the defendant City has made no further investigation of the plant or property of the defendant Water Company to ascertain its value, until after the adoption of the charter amendment section 264A hereinafter referred to, since which time the defendants, Anderson, Van Cise and Fellows, constituting the so-called Public Utilities Commission, in pretended compliance with the terms of such amendment, have been making or pretending to make such investigation. There has been no sub-

stantial change in the extent and value of the property appraised since the appraisement, except as contemplated in the award of the appraisers, and in that the defendant Water Company has expended $694,343 for additions, enlargements and betterments, necessary in order to keep pace with the growth and necessities of the defendant City. (Record, p. 16.)

At no time since such appraisement was made has the defendant City submitted, or offered to submit, to the qualified electors of the City at any election, either general or special, the question whether the defendant City should purchase of the defendant Water Company and the complainant trustee the said property so appraised, at the said appraised value, except as it has done so under and by section 264A of the charter, as hereinafter stated. On the contrary, the defendant City has refused to submit such question to any further vote of the electors, and especially have the individual defendants constituting the Public Utilities Commission expressly refused so to do, either at the special election then called for September 6, 1910, or otherwise. (Record, p. 17.)

Notwithstanding the foregoing, and in pursuance of the wrongful, illegal and inequitable scheme and plan of the defendant City, there was adopted at the general city election held in the month of May, 1910, a so-called amendment to the charter of the defendant City, designated as section 264A, a true copy of which is attached to the bill and is found at page 79 of the Printed Record. In and by said section 264A, which the defendant City claims to be a part of its charter, there is created a Public Utilities Commission, consisting of three members, the first of whom are to be the defendants Anderson, Van Cise and Fellows, who

have qualified and are now acting and claiming to act as such commissioners, and pretending to exercise the power and authority which said section purports to confer upon them. Said section 264A, in addition to the creation of the Public Utilities Commission, and the specification of its powers, duties and authority, provides that if the defendant Water Company should place in escrow with the Continental Trust Company of Denver, on or before July 1, 1910, a good and sufficient deed of conveyance from the defendant Water Company to the defendant City, for all the property of every description included and embraced in the appraisement under Ordinance 163 of 1907, free and clear of all liens and encumbrances, and accompanied by a full surrender and release of any and all rights, claims and demands which said Company or any of its subsidiary companies might have against the defendant City or against any of said property, with direction in writing to deliver the same to the commission in exchange for $7,000,000 par value of 4½ per cent bonds of the defendant City, then said commission should file its acceptance with the Continental Trust Company, and the same should constitute a binding contract of purchase. It is averred, however, that $7,000,000 is less than the amount of the outstanding bonds secured by the mortgage to the complainant Trustee, to say nothing of the outstanding bonds of the defendant South Platte Company, which are likewise secured by a mortgage upon its property. In and by said section 264A it was provided that, in case the defendant Water Company should not accept the said $7,000,000 in bonds, or should fail or refuse to fully comply with the provisions of section 264A, then, at a special election to be held on the first Tues-

day in September, 1910, there should be submitted to the qualified taxpaying electors of the defendant City the question of issuing $8,000,000 in bonds of the defendant City, to bear interest at the rate of 4½ per cent per annum, of such date and in such form and maturing at such times as the commission might prescribe; the same to be sold and used to construct and put into operation a complete system of waterworks for supplying said defendant City with water. (Record, pp. 17-18.)

The offer contained in said section 264A of $7,000,000 for the identical property which had theretofore been appraised at $14,400,000 was not made with any expectation that such offer would be accepted, because the defendant City and its officials well knew that such offer was less than one-half the actual value of the property sought to be acquired, and as so appraised; but such offer was made by the defendant City, its officials and the Public Utilities Commission as a part of a conspiracy and plan between said parties, and certain newspapers and agitators in the defendant City, to destroy and affect the value of the property belonging to the defendant Water Company, and to so injure the same and discredit the securities of said company as to enable the defendant City to obtain said property and plant at less than its appraised and actual value. (Record, p. 18.)

The defendant Water Company did not, prior to the first of July, 1910, make or deposit such deed or deeds in escrow with the Continental Trust Company, nor would the complainant as trustee have joined in such conveyance or have permitted the same to be made, nor could it have done so without violat-

ing the obligations imposed upon it by said mortgage and totally disregarding its duties to bondholders. (Record, pp. 18-19.)

Because of the failure of the defendant Water Company to make and deposit such deed or deeds of conveyance, the Public Utilities Commission and its members, claiming and pretending to act under said section 264A, but in reality in furtherance of the aforesaid conspiracy and plan to depreciate the value of the property of the defendant Water Company, and with the intent of ultimately obtaining or purchasing the same at a reduced price, regardless of the appraisement, have caused to be introduced in and passed by the City Council of Denver, Ordinance 98 of the Series of 1910, approved July 6, 1910, a copy of which, marked "Exhibit E," is attached to the bill and is found at page 82 of the Record. This ordinance provides for a special election, to be held on the first Tuesday in September, 1910, as provided by section 264A, and provides among other things that, in event of the failure of the defendant Water Company to place its deed in escrow as aforesaid, there shall be submitted at such election to the qualified taxpaying electors the question of issuing $8,000,000 in bonds, to be sold or used to construct and put into operation a complete system of waterworks for supplying the defendant City and its inhabitants with water for all purposes, and prescribing the form of ballot, upon which should be printed in substance the words "for" or "against" the issuance of $8,000,000 in bonds "for the construction of a new municipal water plant." (Record, p. 19.)

By virtue of the provisions of sections 264A, as well as by the provisions of said ordinance calling

the election, the bonds, if authorized, can be issued and used, and the proceeds thereof applied, solely to the construction of and putting into operation a complete, separate, municipal system of waterworks, and the same cannot be devoted to the purchase of the existing water plant of the defendant Water Company, nor can any portion thereof be devoted to the payment of the appraised price of $14,400,000 therefor; and if at such city election the bonds should be authorized, then the defendant City is absolutely committed to the expenditure of said sum of money or of the proceeds of the bonds issued to said amount for the purpose of constructing a new plant entirely distinct from that of the defendant Water Company, notwithstanding the fact that the defendant City has heretofore elected to and is now bound to purchase the said plant and waterworks of the defendant Water Company at and for the appraised value of $14,400,000. It is an impossibility for the defendant City, for the sum of $8,000,000, or for any sum less than two or three million dollars in excess of the appraised value of the defendant Water Company's plant, to construct such an independent municipal water plant adequate to the needs of the defendant City, and no supply of water therefor can be obtained without the purchase and use of a large portion of the plant of the defendant Water Company. (Record, pp. 19-20.)

By the Constitution and statutes of Colorado and the charter provisions of Denver, the defendant City is authorized to contract for a supply of water for its city and municipal purposes, by arrangement with private individuals or corporations,

or it is authorized by construction, purchase or lease to acquire and operate a waterworks system of its own; but the defendant City is not authorized by any provision of the Constitution, statutes or charter, but, on the contrary, is without authority, to obtain by purchase a complete waterworks system already constructed and in existence, and prepared to furnish an adequate supply of water to the defendant City and its inhabitants, and at the same time to construct and put into operation another and duplicate system of waterworks, or to authorize, issue or sell its bonds for such last-named purpose, as it proposes to do; and inasmuch as, prior to the adoption of said section 264A, and prior to the passage of Ordinance 98 of the Series of 1910, calling said election, the defendant City had already entered into a binding contract with the defendant Water Company, and with the complainant Trustee, to purchase the existing waterworks and plant for $14,400,000, as appraised, subject to adjustments, section 264A, in so far as it purports to require the submission to a vote of the question of issuing $8,000,000 in bonds for the purpose of constructing and putting into operation a complete new system of waterworks, and said Ordinance 98 of 1910, calling such election for such purpose, were and each is wholly beyond the powers, express or implied, of the defendant City. (Record, pp. 20-21.)

Even though there had been no election by the defendant City to purchase the waterworks system of the Water Company prior to the adoption of section 264A, that section, when construed in connection with the prior existing contracts aforesaid, constitutes an election to purchase said property as so appraised

under and by virtue of Ordinance 44 of 1890, and by reason of such appraisement the City is by the very terms of the charter amendment obligated to purchase the property at the appraised value; or, if not, then such charter amendment, so construed in the light of the pre-existing contracts, constitutes an absolute election to purchase and an offer to pay the sum of $7,000,000 in bonds. And, as the defendant Water Company refused to sell at such sum, it has become necessary to have the purchase price determined by a board of appraisers or arbitrators, as provided by section 11 of Ordinance 44 of 1890. But, notwithstanding its election to purchase and the failure to agree upon the purchase price, the defendant City has failed and refused to name its appraisers or arbitrators under said section, or to proceed to any appraisement. On the contrary, by the terms of section 264A and the declarations and acts of the Public Utilities Commission, the defendant City intends and proposes to repudiate its obligation to submit to an appraisement, and having failed in its scheme and device to force the defendant Water Company and complainant to accept such grossly inadequate amount of $7,000,000 of bonds, it proposes to vote bonds for the avowed and only purpose of constructing its own municipal water plant. (Record, pp. 21-22.)

The unconstitutional impairment of the existing contract is thus, in part, alleged (Record, pp. 22-23):

> "Sixteenth. Your orator avers that said Section 264A of the charter is in conflict with Article I, Section 10, of the Constitution of the United States, and with Article II, Section 11, of the Constitution of the

State of Colorado, and also in conflict with Article XIV of the amendments to the Constitution of the United States, and with Section 25, Article II, of the Constitution of the State of Colorado, to the extent hereinafter specified, and in the following respects and each of them:

(a) It constitutes an impairment of the prior existing contract between the defendant City on the one part and the defendant Water Company, your orator as trustee in said deed of trust or mortgage and the holders and owners of the bonds secured thereby, on the other part, and constitutes an attempted deprivation of your orator as such trustee and the bond holders which it represents, as well as the defendant Water Company, of its and their property without due process of law, in that in and by said Section 11 of Ordinance No. 44 of the Series of 1890 the defendant City is and was prior to the pretended adoption of said charter amendment obligated to purchase the said water works system and plant for and at the price to be arrived at by an appraisement as provided in said Section 11, and not otherwise, nor at any other price or valuation whatsoever, and by the steps heretofore taken as hereinabove recited, the defendant city had elected to, and prior to the pretended adoption of said Section 264A, was bound and obligated to, purchase said water works system and plant for and at the ap-

praised valuation of $14,400,000.00, subject to the foregoing adjustments; * * *

(b) Even though there had been no election upon the part of the defendant City to purchase said water plant and system prior to the adoption of said Section 264A, as in truth and in fact there was, nevertheless in and by said Section 264A, as construed in the light of the prior existing contracts and obligations of the defendant City and the defendant Water Company, the city and county of Denver has elected to make such purchase at the appraised value, and by reason thereof a binding contract was entered into whereby the defendant City became obligated to pay to the defendant Water Company the appraised value of said property and plant as aforesaid. But notwithstanding said election contained in said Section 264A to purchase said property and plant at said appraised value, and totally disregarding the rights of the defendant Water Company and your orator, and in direct impairment of said contract to purchase under Section 11 of Ordinance No. 44 of the Series of 1890, said Section 264A proceeds to provide that unless the defendant Water Company shall accept the totally insufficient, inadequate and illegal offer of seven million dollars for its water plant, the defendant City will proceed to vote bonds for the purpose of constructing its own municipal water plant and will proceed to such construction—all as is hereinbefore more fully alleged.

(c) Even though there had been no election to purchase said property and plant of the defendant Water Company at the appraised value or otherwise prior to the adoption of said Section 264A, nevertheless in and by the said section itself, when construed in connection with Section 11 of Ordinance No. 44 of the Series of 1890, the defendant City elected to purchase the said plant and property of the defendant Water Company, and offered to pay therefor the sum of seven million dollars in bonds of the defendant City—all as hereinabove more fully specified; and upon the refusal of the defendant Water Company to accept such offer, as hereinbefore shown, a disagreement arose between the parties as to the price to be paid therefor, and a binding contract and agreement was created under and by virtue of said Section 11 of said Ordinance No. 44, whereby the question of the price to be paid by the defendant City for said property should be determined by appraisers or arbitrators appointed in the manner specified in said Section 11. Notwithstanding, however, the creation of such obligation, said Section 264A proceeds by its terms to impair such contract, in that it provides that should the defendant Water Company refuse to accept such offer to purchase said water system at and for seven million dollars of the bonds of the defendant City, said defendant City shall forthwith proceed to vote and issue its bonds

for the purpose of constructing its municipal water plant and shall construct the same—all as hereinbefore fully alleged."

In pursuance of the wrongful plan and purpose so devised by the defendant City, it and its inhabitants, and the users and consumers of water from the system of the defendant Water Company, have been and are now claiming and pretending that each and every right, contract and privilege theretofore owned or enjoyed by the defendant Water Company or the complainant Trustee, as resting upon any ordinance, contract, franchise or agreement, ceased and came to an end on April 10, 1910; and that the dedefendant Water Company had since been doing business within said city solely at sufferance and at the will of the municipality and its inhabitants; and that there is no existing contract obligating the City to purchase the said waterworks and plant at the appraised value, or at any other price, or at all, or any other contract or obligation of any nature whatsoever; all of which claims and pretenses were wholly without foundation in law or equity, and were made and insisted upon with the intent and with the result of depreciating the value of said property, and the same have already impaired the security of the bondholders for whom complainant is Trustee, and if persisted in will further very greatly impair, if not wholly destroy, the interest of complainant as Trustee and the holders of said bonds. (Record, p. 24.)

The mortgage conveyed to the complainant as Trustee not only all of the physical and tangible property of the defendant Water Company, but all of

its franchises, ordinances, rights, contracts, and choses in action, etc., and all the income therefrom, and attention is called to the provision of the mortgage already quoted with respect to the payment directly to the trustee by the defendant City of the purchase price of the water plant in event of its sale to the City. (Record, p. 24.)

Paragraphs Nineteenth and Twentieth of the bill (Printed Record, pp. 25-27) set forth the disagreement between the complainant Trustee and the Water Company respecting the course to be pursued, and, as petitioners lay great stress upon the claim that there is no divergence in interest between the complainant and the defendant Water Company, we quote these paragraphs of the bill in full:

> "Nineteenth. Your orator further avers that The Denver Union Water Company and its officers and directors claim and assert that the valuation of $14,400,000 so placed upon said property by the board of appraisers was and is inadequate and insufficient, and that said property at a fair valuation is and was at the time of said appraisement reasonably worth a sum largely in excess of $14,400,000; and further assert that, while said company has heretofore in all respects complied with, and hereafter will in all respects comply with and fulfill, all of its contract obligations to and with the said city and county and with your orator, yet, in the opinion of said company and its officers and directors, the said City and County of Denver, by reason, among other things, of its

failure and refusal to consummate the purchase of said property at such appraised value, and its repeatedly declared position that it is not obligated so to do, and its wholly inequitable and unlawful conduct as herein set forth, has become obligated to said The Denver Union Water Company to renew its contract with said company for the additional period of twenty years, as provided in said Ordinance No. 44 of the Series of 1890, and that said company and its officers and directors are of the opinion, and have determined, that it is to the best interest of said company and its stockholders not to bring or maintain any suit or proceeding against said City and County of Denver founded on any contract or election to purchase said property, either at the said appraised value or otherwise, but, on the contrary, to assert and litigate the right of said company to such new contract with the said City and County of Denver for such additional period of twenty years. Therefore, the said company has failed and refused, and still does fail and refuse, to institute or maintain, or to direct or authorize the defendant South Platte Company, which it controls, to institute or maintain, either alone or jointly with your orator, any suit or proceeding whatever to compel the City and County of Denver to purchase the said property at the price fixed and determined by said board of appraisers, or at a price to be fixed by appraisement, or any suit or proceeding to enforce

any election or obligation of said city and county to purchase said property; and the defendant South Platte Company, for like reasons and acting under the control of the defendant water company, likewise refuses so to do. Your orator avers that, if the existing contract with the City and County of Denver be specifically enforced and the said city and county be required to complete said purchase and pay the purchase price aforesaid, ample means will be afforded to discharge all liens upon said property and pay in full all bonds secured by the deed of trust or mortgage in which your orator is trustee as aforesaid, and which your orator has the right to call in and pay at par and accrued interest, at any time prior to April 9, 1911, and also pay in full all of the outstanding bonds of said South Platte Company, and leave a considerable sum to be paid and returned to said The Denver Union Water Company and the South Platte Company, as and for their respective equities in said properties. But unless the said contract be specifically enforced and said purchase completed and the purchase price paid, the result will be that by reason of the various acts and doings of the said City and County of Denver and its representatives heretofore done and now being carried on and threatened to be done, as herein set forth, the saleable value of the property which constitutes the security held by your orator for the benefit of said bondholders will be very greatly

impaired and reduced, the income from said property entirely destroyed, and thereby it will be impossible for The Denver Union Water Company to pay, or for your orator to realize therefrom for the benefit of the bondholders, a sum sufficient to satisfy the principal and interest of such bonds; and, furthermore, the market value of such bonds in the hands of the holders thereof will also be greatly impaired and diminished, if they are not rendered entirely unmarketable. If said bond election, now set for the 6th day of September, 1910, is permitted to be held, and such proposed issue of bonds authorized thereat, and such bonds are allowed to be issued and sold for the purpose of constructing and putting in operation a complete system of municipal water works, as said city and county now proposes, and unless prevented by injunctive process of this court will proceed to do, the said city and county will thereby be practically and irrevocably committed to the construction of a new, separate, independent and duplicate system of water works, which would be in competition with that of your orator and the defendant Water Company, and destructive of its income-producing, as well as saleable, value; thereby not only greatly impairing, if not entirely destroying, the value of the security held by your orator as trustee for the benefit of the bondholders as aforesaid, but also placing upon the city and county and all its inhabitants and property owners and taxpay-

ers a great, excessive and useless burden of indebtedness, to the extent not only of $8,000,000, but of many additional millions of dollars which must necessarily from time to time be authorized and incurred if such municipal water plant is to be completed and put in commission. And, while providing for the principal and interest of said indebtedness, the city and county and its inhabitants, property owners and taxpayers must also provide for, and pay, the appraised purchase price of the existing water works system and plant, as it is now obligated to do, and also continue to pay for the supply of water furnished thereby to said city and county and its inhabitants.

Twentieth. Your orator further avers that it has no plain, speedy, adequate or any remedy at law; that it is willing and hereby offers, so far as its interest in said plant is concerned, to complete the sale thereof to the defendant city for and at the appraised valuation, and otherwise to abide by any order or decree in the premises which may be made herein; but that the defendants Water Company and South Platte Company must necessarily join in any such conveyance, and for the reasons hereinbefore set forth said companies, and each of them, and their respective officers and directors, are unwilling to join in such a conveyance, and will not do so unless directed and required so to do by competent legal authority. And unless prevented by order of this honorable court and

required in all particulars to fulfill, carry out and perform the terms of existing contracts, the defendant City will persist in the inequitable and unconscionable course of conduct hereinbefore recited, and will not abide by or perform the said contracts hereinabove set forth or any part thereof—all of which will necessarily result in great and irreparable damage and injury to your orator as trustee in said deed of trust or mortgage, and to the holders and owners of the bonds secured thereby."

It is then alleged that the defendant Speer, as mayor of the City of Denver, must execute in behalf of the city any bonds authorized by section 264A, and the election thereunder, and that certain of the other defendant individuals, as officers of the City, must participate in the execution and issuance of such bonds, or supervise the holding of the proposed election on the first Tuesday of September, 1910.

In accordance with the award of the appraisers made pursuant to said Ordinance No. 44 of the Series of 1890, certain adjustments will be required in the amount of the award, due to any changes in the amount of property owned by the defendant Water Company, and covered by the appraisement and an additional amount should and must be added for property acquired since the appraisement.

The bill prays (pp. 27-30):

1. For the usual writs of subpoena.

2. That a writ of injunction issue, directed to the defendant City and its various defendant officials, restraining them and each of them, their successors

in office, agents, servants, etc., from holding, or attempting to hold, the said election on the first Tuesday in September, 1910, for the purpose of submitting the question of the issuance of said $8,000,000 in bonds, or from issuing or attempting to issue or executing any bonds for the purposes specified in section 264A, or from doing, or attempting to do, any act whatsoever tending to accomplish any of such things, or from taking any steps looking to the construction of a municipal water plant for the defendant City, and that upon final hearing the injunction be made perpetual. (Record, p. 28.)

3. That by the decree of court the provisions of section 264A of the charter, contemplating and providing for the construction and operation of a municipal water plant, and the authorization and issuance of bonds for that purpose, be held to be wholly and entirely void and of no effect, for the reason that they and each of them are in conflict with and in violation of the articles and sections of the Constitutions of the United States and of the State of Colorado specified in the bill; that by said decree the true force and effect of the existing contract relations between the defendant City, on the one part, and the defendant Water Company, the complainant as trustee under said mortgage, and the holders of the bonds secured thereby, on the other part, be declared, and that the court decree that in and by said existing contract relations the defendant City is obligated to complete the purchase, and the defendants Water Company and South Platte Company are likewise obligated to complete the sale, of said waterworks, for and at the appraised value, and the said City shall be prohibited meanwhile from constructing, or attempting to construct, a new and independent municipal water plant;

and declaring and decreeing complainant's interest in said property, and providing for the payment of the purchase price to it, in order that it may fully perform the trust imposed upon it by said mortgage; and, after applying such purchase price to the payment of the outstanding bonds and accrued interest and costs and expenses, that the complainant may return the balance to the defendant Water Company; and that by said decree the defendants Water Company and South Platte Company shall be ordered and directed to convey to the defendant City, upon payment of the purchase price, all of said property, and shall likewise be required to satisfy and discharge all outstanding liens upon said property, and that they and the defendant City shall be directed to fully and in all particulars carry out and fulfill its existing contracts, and that the same may be specifically enforced by the court. (Record, pp. 28-29.)

As an alternative, that, should the court determine that the defendant City has elected to purchase the water plant of the defendant Water Company, but that, notwithstanding the aforesaid events, the purchase price has not been fixed or determined, then that the court proceed through a master or appraisers to ascertain, appraise and determine the value of the plant and property, in accordance with the existing contracts between the defendant City and the defendant Water Company, and the amount of the purchase price to be paid by the defendant City therefor; and then that by the decree the defendant City be held obligated to purchase, and the defendants Water Company and South Platte Company and the complainant, as trustee, obligated to sell, such plant; and that the defendant City shall forthwith

pay the purchase price so ascertained to the complainant, in order that it may be applied to the satisfaction of the bonds secured by the mortgage, etc.; and that the defendants Water Company and South Platte Company and the defendant City be required to do and perform all things, and to make the conveyances necessary to be done and made, in order to complete such purchase and transfer. (Record, p. 29.)

The bill concludes with a prayer for general relief. (Printed Record, p. 30.)

ARGUMENT.

In this brief, and under the following headings, we purpose to demonstrate that the Circuit Court had jurisdiction of this controversy by reason both of diverse citizenship and a federal question; that the bill stated a cause of action; and that not only did the court wisely exercise its discretion in granting the interlocutory injunctions, but that, assuming the averments of the bill to be proven, the complainant, this respondent, would be entitled to a final decree.

I. THE JURISDICTION OF THE CIRCUIT COURT.

(1) The Circuit Court Has Jurisdiction Because of Diversity of Citizenship. There Is No Collusion.

(a) The Applicable Legal Principles.

(b) The Facts Shown by the Record.

(2) In Any Event, the Bill Presents a Federal Question Over Which the Circuit Court Has Jurisdiction Independent of Diverse Citizenship.

(a) **What Is Sufficient to Constitute a Federal question?**

(b) **The Charter Amendment, Section 264A, and Ordinance No. 98 of 1910, Are Laws.**

(c) **Any Law Impairing the Obligation of Any Contract Involving Property Rights Is Inhibited by the Constitution.**

II. THE CONTRACT INVOLVED.

(1) Under Ordinance 44 of 1890, the City Was Required to Purchase at the Expiration of the Twenty-Year Period, on April 10, 1910, If It Did Not Renew; as the Circuit Court of Appeals Held.

(a) **The Terms of Ordinance 44, Considered in the Light of Conditions Existing at the Time of Its Enactment, Compel This Conclusion. Such Construction Does Not Render the Contract Ultra Vires.**

(b) **Contemporaneous Construction of the Contract by Both Parties Fortifies This Conclusion.**

(c) **The City's Conduct Estops It from Otherwise Contending.**

(d) **The City, Having Failed to Renew at the Expiration of the Twenty-Year Period, Is Firmly Obligated to Purchase. The ordinance was not nullified by 41 Colorado.**

(2) ASSUMING, ARGUENDO, THAT ORDINANCE 44 OF 1890 IN AND OF ITSELF DOES NOT REQUIRE A PURCHASE (IF NO EXTENSION BE GRANTED), NEVERTHELESS, BY REASON OF THE ENACTMENT OF ORDINANCE 163 OF 1907, AND THE PROCEEDINGS THEREUNDER, THE CITY IS OBLIGATED TO PURCHASE.

(3) FURTHER ASSUMING, ARGUENDO, THAT THE CITY IS NOT BOUND TO PURCHASE BY REASON OF EITHER ORDINANCE 44 OF 1890 OR ORDINANCE 163 OF 1907, AND THE PROCEEDINGS THEREUNDER, IT IS STILL OBLIGATED TO SUBMIT TO THE QUALIFIED ELECTORS OF DENVER THE PROPOSITION OF PURCHASING AT THE APPRAISED VALUE OF $14,400,000.

(4) IF NO OBLIGATION TO PURCHASE WAS CREATED OR EXISTED PRIOR TO THE ADOPTION OF CHARTER AMENDMENT 264A, THAT PORTION THEREOF PROVIDING FOR THE PAYMENT OF $7,000,000 IN BONDS FOR THE WATER PLANT CONSTITUTED IN ITSELF AN ELECTION TO PURCHASE AND AN OFFER OF THAT AMOUNT, UNDER THE TERMS OF SECTION 11 OF ORDINANCE 44 OF 1890, AND THEREUPON THERE AROSE A FAILURE TO AGREE UPON THE PURCHASE PRICE, WHICH BECAME SUBJECT TO SETTLEMENT BY APPRAISEMENT OR ARBITRATION AS SPECIFED IN SAID SECTION 11.

(5) THE OBLIGATION OF THE CITY TO PURCHASE IS AT THE APPRAISED VALUE OF $14,400,000; IF NOT, THEN AT A VALUE

TO BE DETERMINED BY THE CIRCUIT COURT, THROUGH A MASTER OR OTHER APPROPRIATE INSTRUMENTALITY.

III. THE IMPAIRMENT OF THE CONTRACT.

(1) THE CONTRACT TO PURCHASE AND TO PAY, HOWSOEVER ARISING, IS IMPAIRED BY CERTAIN PROVISIONS OF THE CHARTER AMENDMENT 264A, AND ORDINANCE 98 OF 1910 ENACTED IN PURSUANCE THEREOF.

(2) EVEN IF THE CONTRACTUAL OBLIGATION OF THE CITY WERE MERELY TO SUBMIT THE QUESTION OF PURCHASE UNDER ORDINANCE 163 OF 1907 TO THE VOTE OF THE QUALIFIED ELECTORATE (SEE HEADING II, (3), *supra*), THAT CONTRACT IS IMPAIRED BY THE SAME CHARTER AMENDMENT AND ORDINANCE.

IV. THE RIGHT OF THE TRUSTEE TO SUE.

(1) THE TRUSTEE MAY SUE TO PROTECT THE TRUST ESTATE FROM DIMINUTION, DESTRUCTION AND IMPAIRMENT.

(2) THIS SUIT IS NOT BROUGHT PRIMARILY TO RECOVER THE CONTENTS OF A CHOSE IN ACTION; AND THE FEDERAL STATUTE PROHIBITING CERTAIN SUITS BY ASSIGNEES IS INAPPLICABLE.

(3) THE COURT HAVING JURISDICTION OF THE CASE BECAUSE OF THE FEDERAL QUESTION, ALL CONTROVERSIES INVOLVED THEREIN MAY BE ADJUDICATED, EVEN THOUGH THE FEDERAL QUESTION BE NOT DECIDED,

OR BE DECIDED ADVERSELY TO THE CONTENTION OF THIS RESPONDENT.

(4) THE RESPONDENT TRUST COMPANY, AS THE ASSIGNEE OF THE ENTIRE CONTRACT, MAY SUE FOR ITS SPECIFIC PERFORMANCE.

(5) CERTAIN OTHER OBJECTIONS OF PETITIONERS (DEFENDANTS) TO THE MAINTENANCE OF THE SUIT, CONSIDERED, AND SHOWN TO BE BASELESS.

(a) The Bill Is Not Too Broad in Its Scope.

(b) The Trustee Under the Mortgage of the South Platte Company Is Not a Necessary or an Indispensable Party. In Any Event, This Question Cannot Be Raised or Considered in the Present State of the Record.

(3) There Was No Such Non-Performance of the Contract by the Water Company as Bars It, or, a Fortiori, the Trustee under Its Mortgage, from Maintaining a Suit for Specific Performance.

(d) The Water Company Is Not Estopped by Reason of Its Conduct from Enforcing Its Rights. In Any Event, Such Conduct Does Not Impair the Rights of the Complainant Trustee.

V. THE BILL STATES A CAUSE OF ACTION.

VI. THE TEMPORARY INJUNCTION WAS NOT GRANTED IMPROVIDENTLY OR CONTRARY TO THE FEDERAL STATUTE (36 Stat. 539, 557.)

I.

THE JURISDICTION OF THE CIRCUIT COURT.

(1) The Circuit Court Has Jurisdiction Because of Diversity of Citizenship; There Is No Collusion.

If the alignment of parties, as made by the complainant, be a proper one, then of course the case presents a controversy between citizens of different states; namely, the complainant Trustee, a citizen of New York, and the various defendants, including the defendants Water Company and South Platte Company, all of whom are citizens of Colorado.

But petitioners charge that there is no real controversy between the complainant and the Water Company; that the record evidences collusion between them for the purpose of creating a case cognizable in the federal courts; and that a re-alignment of the parties according to their interests would result in making the Water Company a joint complainant, and thereby destroying the requisite diversity of citizenship.

We expect to show that each of these contentions is entirely unsupported by the record, and depends upon the mere assertions and insinuations of the petitioners themselves.

Before stating the facts, it is well briefly to state certain pertinent and controlling principles which this court has emphatically announced.

(a) The applicable legal principles.

If the case presents a *bona fide* justiciable controversy between the complainant and the defendants,

it is immaterial that in the creation thereof it was desired and contemplated that resort should be had to the federal courts; or that counsel acting for the complainant should previously have been employed by the alleged collusively joined defendant; or that the real interests of such defendant may be advanced by the success of the complainant; or that the controversy may be merely one as to the policy of instituting the suit; or that there was concert of action prior to or in the bringing of the suit, and the preparation and filing of pleadings; or that all of the allegations of the bill may be admitted by the answer of such defendant filed concurrently therewith.

The foregoing postulate is not announced because justified or required by the facts pertaining to the suit at bar, but as an epitome of the rules this court has stated in various cases.

Reagan vs. Farmers L. & T. Co., 154 U. S., 362, 393.

Dickerman vs. Northern Trust Co., 176 U. S., 181, 189.

South Dakota vs. North Carolina, 192 U. S., 286, 311.

Doctor vs. Harrington, 196 U. S., 579, 588.

Blair vs. Chicago, 201 U. S., 400, 448.

Chicago vs. Mills, 204 U. S., 321, 325.

Metropolitan Ry. Receivership, 208 U. S., 90, 110.

Venner vs. Great Northern Ry. Co., 209 U. S., 24, 32.

In Reagan vs. Farmers Loan and Trust Co., *supra*, the trust company brought suit against the

International and Great Northern Railroad Company and the individuals constituting the state railroad commission of Texas, to enjoin certain acts of the commission. The railroad company *"appeared, filed an answer and also a cross-bill similar in its scope and effect to the bill filed by the plaintiff and praying substantially the same relief"* (154 U. S., 367). In the Circuit Court it was charged that the suit was a collusive one between the trust company and the railroad company, but the contention was overruled (51 Fed., 529, 536). On the appeal to this court, it said, after holding that the charter of the railroad company was a contract (p. 393):

> "* * * It is at least a question which arises as to the extent to which that contract goes, and one in which the corporation has a right to invoke the judgment of the courts; and if the corporation, a citizen of the State, has the right to maintain a suit for the determination of that question, clearly a citizen of another State, who has, under authority of the laws of the State of Texas, become pecuniarily interested in, equitably indeed the beneficial owner of, the property of the corporation, may invoke the judgment of the Federal courts as to whether the contract rights created by the charter, and of which it is thus the beneficial owner, are violated by subsequent acts of the State in limitation of the right to collect tolls. Our conclusion from these considerations is that the objection to the jurisdiction of the Circuit Court is not tenable, and this,

> whether we rest upon the provisions of the statute or upon the general jurisdiction of the court existing by virtue of the statutes of Congress, under the sanction of the Constitution of the United States."

In Dickerman vs. Northern Trust Co., 176 U. S., 181, it appeared that a mortgage given to secure an issue of bonds provided that the bonds should become payable if any execution should be sued out against the property of the company and the same should not be forthwith satisfied. A bondholder brought suit before a justice of the peace upon six coupons, *either directly or indirectly through the legal firm who were also counsel for the defendant company.* That company immediately consented to a judgment and to the issue of an execution, and upon the same day the trustees under the mortgage gave notice that, by reason of such execution having been unpaid, they declared the principal and interest upon all the bonds to be immediately payable, and at once took possession of the property.

The court, speaking through Mr. Justice Brown, said, at page 189:

> "We have no doubt that this judgment was collusive in the sense that it was obtained by the plaintiff and consented to by the defendant company for the purpose of giving the trustees a legal excuse for declaring the principal and interest of the mortgage to be due, and to give authority for a foreclosure. But this did not constitute col-

lusion in the sense of the law, nor does it meet the exigencies of the petitioners' case. Collusion is defined by Bouvier as 'an agreement between two or more persons to defraud a person of his rights by the forms of law, or, to obtain an object forbidden by law,' and in similar terms by other legal dictionarians. It implies the existence of fraud of some kind, the employment of fraudulent means, or lawful means for the accomplishment of an unlawful purpose; but if the action be founded upon a just judgment, and be conducted according to the forms of law and with a due regard to the rights of parties, it is no defense that the plaintiff may have had some ulterior object in view beyond the recovery of a judgment, so long as such object was not an unlawful one. * * *

If the law concerned itself with the motives of parties new complications would be introduced into suits which might seriously obscure their real merits. If the debt secured by a mortgage be justly due, it is no defense to a foreclosure that the mortgagee was animated by hostility or other bad motive. * * *

* * * * * * * *

The reports of this court furnish a number of analogous cases. Thus, it is well settled that a mere colorable conveyance of property, for the purpose of vesting title in a non-resident and enabling him to bring suit in a Federal court, will not confer jurisdic-

tion; but if the conveyance appear to be a real transaction, the court will not, in deciding upon the question of jurisdiction, inquire into the motives which actuated the parties in making the conveyance." (Italics ours.)

In Blair vs. Chicago, 201 U. S., 400, the facts were that the Guaranty Trust Company of New York filed three suits in the United States Circuit Court for the Northern District of Illinois against certain street railroad companies in Chicago. On the day these suits were filed the general issue was joined, a jury waived, and judgments were rendered against the respective defendants for large sums. Executions were immediately issued and returned, no property found; whereupon bills were filed by the Guaranty Trust Company for the appointment of receivers, and receivers were immediately appointed, who under an order of court instituted certain suits against the city of Chicago on alleged contracts to which it was a party. The city answered and alleged, among other things, that the suits leading up to the receivership were collusive and in pursuance of a scheme concocted between the plaintiff and defendants in those suits for the purpose of conferring jurisdiction upon the United States court, and that the trust company was not a *bona fide* owner of the judgment upon which the receivership suits were brought. The court, in holding that collusion was not shown, said (p. 448):

"It is further argued that the entire proceedings were fraudulent and collusive;

that no money was in fact loaned, and that they were the result of a conspiracy between corporations of Illinois to obtain the jurisdiction of the Federal court, and its decision on the controverted rights of the parties under the statutes of the State. We have examined the supplemental records submitted since the argument in this court, on this branch of the case, and think the charges of bad faith and conspiracy are not sustained. We have no doubt that the money was loaned by the Guaranty Trust Company to these corporations and that the original judgments were *bona fide*. *As to the conspiracy to get the case into the Federal court, with a view to the decision of the rights of the parties therein, we are not aware of any principle which prevents parties having the requisite citizenship and a justiciable demand from seeking the Federal courts for redress, if such be their choice of a forum in which to have contested rights litigated. Having a proper cause of action and the requisite diversity of citizenship confers jurisdiction upon the Federal courts, and in such cases the motive of the creditor in seeking Federal jurisdiction is immaterial.* South Dakota vs. North Carolina, 192 U. S., 286, 310; Dickerman vs. Northern Trust Company, 176 U. S., 181, 190; Lehigh Mining and Manufacturing Company vs. Kelly, 160 U. S., 327, 336; Crawford vs. Neal, 144 U. S., 585; Cheever vs. Wilson, 9 Wall., 108, 123; Smith vs. Kernochen, 7 How., 198, 216.

> It is true that the judgments were taken and the receivers appointed on the same day, and it is quite likely that the receiverships were in view when the judgments were taken, and that preparations had been made in that direction, but we perceive in this no legal objection to the jurisdiction of the court." (Italics ours.)

Chicago vs. Mills, 204 U. S., 321, is particularly in point. In that case it appeared that Mills, a citizen of California and a stockholder of the People's Gas Company of Chicago, brought a suit in behalf of himself and other stockholders against the city of Chicago and the gas company to restrain the city from enforcing, and the company from observing, an ordinance limiting the rate to be charged for gas in that city. The bill alleged that the ordinance was invalid and impaired the obligation of a certain contract between the city and the company. *It also alleged a demand made by the plaintiff upon the gas company to institute a suit to prevent the enforcement of the ordinance, a former suit by the company then pending on appeal in the Supreme Court having been dismissed in the Circuit Court for want of jurisdiction; but the company refused to institute the suit, giving as its reason that the same would excite public prejudice, which it was deemed of importance to avoid.* A plea was interposed by the defendant city to the effect that the suit was brought in accordance with a collusive understanding between Mills and the gas company, based on the fact that by reason of Mills' citizenship he could sue in the United States courts, while a suit by the company would have been cognizable only in the

state courts. *It was proven that the officers of the company openly expressed their desire to see the complainant succeed in the suit; that counsel for the complainant was the same counsel who had previously argued the company's case in the Supreme Court;* that one of the stockholders and directors of the company had contributed a large sum toward Mills' expenses in his action; that the complainant once admitted on examination that the suit was brought to confer jurisdiction on the United States court; and, generally, that the suit was in the interest of the gas company. (See opinion in Circuit Court, 143 Fed., 430.)

This court, affirming the decree of the Circuit Court upon this question, said, *inter alia* (pp. 327-330):

> "When the litigation [namely, the original suit brought in the name of the company against the city] had progressed thus far, complainant Mills, who was the largest stockholder in the company, consulted counsel in New York with a view to protecting his interests. Counsel having examined the record prepared a letter dated December 16, 1902, addressed to the directors of the gas company and signed by complainant, in which he set forth that the proceedings in the suit concerning the ordinance reducing the price of gas to 75 cents per 1,000 cubic feet had been submitted to his counsel, together with a copy of the opinion of the Circuit Court, and that an appeal was then pending in the Supreme Court of the United States;

the advice of his counsel that that suit might not adequately protect his interests, as the bill was dismissed for want of jurisdiction and that the Supreme Court might limit the decision of the case to the question of jurisdiction. And, further, that it did not involve the question of the power of the council of the city of Chicago to reduce the rates of the company. He then requested the institution of a suit against the city of Chicago at the earliest practicable moment for the purpose of preventing the enforcement of the ordinance, upon the ground that it impaired its charter contract and that the council had no power to pass it. The letter further expounded the necessity of resorting to a court of equity for protection of the company's rights.

The record discloses that the company's counsel came to New York, where a conference was had with the counsel retained by Mills, and a difference of opinion was developed as to the propriety and advisability of a new suit which would cover the points in difference. The result of this conference was that the company's counsel notified counsel for Mills that he should advise the board to decline the request to bring a new suit.

On January 29, 1903, the company wrote to Mills, declining to begin the suit, and sent a copy of the resolution reciting the belief of the board that for the company to institute further legal proceedings to test the validity

of the ordinance of October 15, 1900, would excite public prejudice against the company, which at that time it was deemed of great importance to avoid, and afterwards, at the annual meeting of the stockholders of the company, a resolution directing the beginning of the suit was defeated.

The question of jurisdiction must be decided, having reference to the attitude of the case at the date the bill was filed, on June 8, 1903. Kirby vs. American Soda Fountain Co., 194 U. S., 141, 145, 146. As to the refusal of the company to institute a new suit, there is nothing in the record to show any concert of action between complainant and the company. *At that time* his counsel in New York was not concerned in the litigation in Chicago or in the appeal to this court. As the case brought by the gas company then stood, it had been dismissed for want of jurisdiction, and an appeal taken from that decree of dismissal. The case did not necessarily involve the question of contract rights, and did not embrace the question of power of the city.

In this attitude of affairs counsel might well advise that the protection of the stockholders' interest required the beginning of a suit which should embrace the vital questions in issue. There was a sharp difference of views between the representatives of Mills and those of the company's solicitors as to the advisability of bringing an action.

* * * * * * * *

It is true that subsequent events made it to the interest of the company to make common cause with Mills against the enforcement of the ordinance in question, but when he began his suit no proceedings were pending which involved the important question of the power of the city upon which the complainant ultimately prevailed.

It is true that an officer of the company, who was the next largest stockholder to Mills, contributed to the expenses in this suit; but he testified, and there is nothing in the record to contradict him, that he paid this money from his own resources without actual repayment or any understanding with the company that he should be reimbursed.

It is true that Mills' counsel was retained in the suit in this court after the beginning of his suit in Chicago.

It is also true that, in answering to a question put in the language of the ninety-fourth rule, as to whether the suit was brought to confer upon the Circuit Court of the United States jurisdiction in a case of which it would not otherwise have cognizance, *complainant answered that he so understood it*, but subsequently said that he did not understand the question. *This admission, intentionally made, would not necessarily show collusion.* But we think that it was not the purpose of the complainant to say more than that he expected his action to be brought in the United States court. When a citizen of one State has a

> cause of action against a citizen of another State which he may prosecute lawfully in a Federal court, and when the suit is free from fraud or collusion, his motive in preferring a Federal tribunal is immaterial. Blair vs. Chicago, 201 U. S., 400, 408, and previous cases in this court therein cited." (Italics ours.)

In re Metropolitan Railway Receivership, 208 U. S., 90, it appeared that a suit was brought in the Circuit Court by two non-resident general creditors of the New York City Railway Company to recover a money judgment and for the appointment of receivers. Upon the same day the defendant company filed its answer, admitting all the allegations of the bill and uniting in the application for the appointment of receivers, who were thereupon appointed. While the fact does not appear in this court's opinion, we are advised that the proof on the subject of collusion conclusively established that the pleadings of the plaintiff creditors were prepared in the office of counsel for defendant company, which had full knowledge of the contemplated action and concurred in, if it did not direct, the institution thereof. This court affirmed the action of the Circuit Court (157 Fed., 449), and held that there was a justiciable controversy and no collusion between the parties. Speaking through Mr. Justice Peckham, it said (pp. 107 *et seq.*):

> "We think that where there is a justiciable claim of some right made by a citizen of one State against a citizen of another

State, involving an amount equal to the amount named in the statute, which claim is not satisfied by the party against whom it is made, there is a controversy, or dispute, between the parties within the meaning of the statute. It is not necessary that the defendant should controvert or dispute the claim. It is sufficient that he does not satisfy it. It might be that he could not truthfully dispute it, and yet, if from inability, or, mayhap, from indisposition, he fails to satisfy it, it cannot be that because the claim is not controverted the Federal court has no jurisdiction of an action brought to enforce it. Jurisdiction does not depend upon the fact that the defendant denies the existence of the claim made, or its amount or validity. If it were otherwise, then the Circuit Court would have no jurisdiction if the defendant simply admitted his liability and the amount thereof as claimed, although not paying or satisfying the debt. * * *

* * * * * * *

It is asserted, also, that there was collusion between the complainants and the street railway companies, on account of which the court had no jurisdiction to proceed, and therefore the suit should have been dismissed by the Circuit Court under section 5 of the act of 1875, already cited. * * *

In this case we can find no evidence of collusion, and the Circuit Court found there was none. It does appear that the parties

to the suit desired that the administration of the railway affairs should be taken in hand by the Circuit Court of the United States, and to that end, when the suit was brought, the defendant admitted the averments in the bill and united in the request for the appointment of receivers. This fact is stated by the Circuit Judge; but there is no claim made that the averments in the bill were untrue, or that the debts, named in the bill as owning to the complainants, did not in fact exist; nor is there any question made as to the citizenship of the complainants, and there is not the slightest evidence of any fraud practiced for the purpose of thereby creating a case to give jurisdiction to the Federal court. That the parties preferred to take the subject matter of the litigation into the Federal courts, instead of proceeding in one of the courts of the State, is not wrongful. So long as no improper act was done by which the jurisdiction of the Federal court attached, the motive for bringing the suit there is unimportant. Dickerman vs. Northern Trust Co., 176 U. S., 181, 190; South Dakota vs. North Carolina, 192 U. S., 286, 311; Blair vs. City of Chicago, 201 U. S., 400, 448; Smithers vs. Smith, 204 U. S., 632, 644.'

Respecting the authorities cited by petitioners, we concede the principles they establish. For instance, the following quotation from Helm vs. Zarecor,

222 U. S., 32, 36, unquestionably announces a well-settled rule:

> "It was, undoubtedly, the duty of the court in determining whether there was the requisite diversity of citizenship to arrange the parties with respect to the actual controversy, looking beyond the formal arrangement made by the bill."

But this doctrine is not controlling in face of the uncontroverted dispute between the complainant and the defendant Water Company in the instant case.

Nor is the case of Dawson vs. Columbia Trust Company, 197 U. S., 178, any more pertinent. Therein it appeared that, prior to the institution of the suit, the defendant Dawson Water Works Company had litigated through the Supreme Court of Georgia a controversy between it and the city arising out of the alleged repudiation by the city of its obligations to pay for water. The litigation resulted in a final decree of the Supreme Court of Georgia in favor of the city. Thereafter the Columbia Trust Company, trustee under the water company's mortgage, brought an exactly similar proceeding in the United States Circuit Court for Georgia, making the water company and the City of Dawson joint defendants.

This court said:

> "It [the water company] was made a defendant, but the court will look beyond the pleadings and arrange the parties according to their sides in the dispute. When that is

> done it is obvious that the Water Works Company is on the plaintiff's side and was made a defendant *solely for the purpose of reopening in the United States Court a controversy which had been decided against it in the courts of the State. There was a pretense of asking relief against it, as we have stated, but no foundation for the prayer was laid in the allegations of the bill. On the contrary, it appears from those allegations that the Water Works Company insisted on its contract with the city, and did everything in its power to carry the contract out.* It also recognized the plaintiff's right to receive the rentals and yielded to its demand. *No difference or collision of interest or action is alleged or even suggested.*" (Italics ours.)

We have italicized the statement of this court that "no difference or collision of interest or action is alleged or even suggested." That statement alone destroys the application of the case to the suit at bar, wherein the collision of interest and dispute between the Trust Company and the Water Company is clearly stated and stands without a syllable of contradiction.

(b) The facts shown by the record.

The bill (Record, p. 25; *supra*, pp. 33-38) charges the fact to be, and it is not in any wise refuted by pleading or evidence, that the Water Company, its officers and directors claim that the valuation of $14,-

400,000, fixed by the board of appraisers, was inadequate and insufficient, and that the property was and is worth much more than this sum; and further asserts that, while the Water Company has in all respects complied with and will comply with all of its contractual obligations with the City and complainant, yet, in the opinion of the Water Company and its officers and directors, the defendant City, by reason of its failure and refusal to consummate the purchase of the property, and its repeatedly declared position that it is not obligated so to do, has become obligated to the Water Company to renew its contract for an additional period of twenty years, and that the Water Company and its officers are of opinion and have determined that it is to the best interest of the company and its stockholders not to bring or maintain any suit against the defendant City founded on any contract or election to purchase either at the appraised value or otherwise, but, on the contrary, to assert and litigate the right of the company to such new contract. By reason thereof, the Water Company has failed and refused, and still fails and refuses, to institute or maintain, or to direct or authorize the defendant South Platte Company, which it controls, to institute or maintain, any suit or proceeding to compel the defendant City to purchase the property at the appraised value, or any other suit to enforce any election or obligation of the defendant City to purchase said property, and that the defendant South Platte Company, for similar reasons, and acting under the control of the defendant Water Company, likewise refuses so to do. It is then alleged that it is to the best interest of the complainant

Trust Company and the bondholders that this contract to purchase should be enforced in order that the full amount of principal and interest upon the bonds secured by the mortgage may be paid. Section twentieth of the bill (Record, p. 26) further avers that the defendants Water Company and South Platte Company are unwilling, for the reasons above stated, to join in any conveyance of the water plant to the defendant City at the appraised or any other value, unless directed and required so to do by competent legal authority.

As above indicated, these allegations stand unchallenged except by the bare argument of counsel, and state a clear justiciable controversy between the complainant Trustee and the defendant Water Company and its subsidiary, the South Platte Company. And this controversy, as so alleged in the bill, is a most natural one. It is apparent that it would be to the best interests of the bondholders represented by the complainant to have the principal and interest of their bonds paid in full, as they would be were the contract to purchase consummated; whereas, in the event of the grant of a new franchise or contract to the defendant Water Company, the time for the payment of these bonds would be continued indefinitely, with no positive assurance that they would ever be fully paid. On the other hand, the officers and directors of the Water Company, representing its stockholders, might well feel that it would be to the interest of the stockholders to have the benefit of a new franchise rather than to accept a purchase price which they deem entirely inadequate.

The case of Chicago vs. Mills, 204 U. S., 321, is in point. In that case Mills as a stockholder made

a demand upon the gas company to institute an action to have the legislation prescribing a maximum gas rate annulled as unconstitutional, and the only reason assigned by the company for its refusal to comply with the demand was that such action would, in its opinion, create friction between itself and the people, which it was advisable to avoid. It was held that federal jurisdiction existed by reason of diverse citizenship.

It is asserted that collusion arises out of the fact that the mortgage provides that the Trustee shall be indemnified by the Water Company against any expense in litigation wherein it may be involved as trustee under the mortgage. We are unable to see, why a *bona fide* provision of that character, inserted in the mortgage in question over sixteen years before the bill was filed, should be any evidence whatsoever of present collusion between the Trustee and the Water Company. The suit is brought by the Trustee, not in behalf of the company, but in behalf of itself and the bondholders, to determine a good-faith controversy which has arisen between it and the several defendants. The obligation upon the part of the Water Company, created many years ago, to indemnify the Trustee on account of expenses in any proceeding certainly does not evidence any co-operation in the institution of the present suit.

An affidavit of Armour C. Anderson, one of the present petitioners (defendant in the Circuit Court), is to the effect that from conversations or newspaper articles occurring or appearing early in the month of June, 1910, *over two months before the bill was filed*, he inferred or believed that certain of the counsel of

record for the complainant Trustee were then acting for the Water Company, not, however, respecting the bringing of this suit (Record, p. 265). No evidence was or could be presented that such counsel represented the Water Company in this litigation, or that they had represented that company in respect of the prospective litigation since the controversy had arisen between it and the complainant. Under much stronger circumstances, this court has stated that such prior relationship of complainant's attorneys with the defendant was no evidence of collusion.

Dickerman vs. Northern Trust Co., 176 U. S., 181, 189.

Chicago vs. Mills, 204 U. S., 321, 329.

Id., 143 Fed., 430, 431.

The assertion that "the bill and cross-bill afford inherent evidence of their simultaneous preparation," and that but three days elapsed between the dates of their filing, is unimportant, even if true, under decisions of this court, from which we have already quoted.

Dickerman vs. Northern Trust Co., 176 U. S., 181, 189.

Blair vs. Chicago, 201 U. S., 400, 448.

Re Metropolitan Ry. Receivership, 208 U. S., 90, 110.

And even if it would be to the real interest of the Water Company for the complainant to succeed, there should be no realignment of parties, even though the only reason assigned by the company for refusing to join as a complainant were one of policy.

Chicago vs. Mills, 204 U. S., 321, 328.

The final insistence is that, in so far as the injunctive feature of the bill is concerned, there is no dispute between the complainant and the Water Company, and as (so it is said) the court has no jurisdiction over the bill viewed solely in its aspect of demanding specific performance, therefore there is no justiciable controversy as to that feature of the case within the cognizance of a federal court. Conjointly with this contention, it is said that the Water Company might have joined as a complainant, and the bill might have been framed in the alternative, asking, first, for a renewal, or, if that were not the proper relief, then for specific performance.

In a later discussion (*post*, p. 206) we shall, we believe, destroy the argument that the court had no jurisdiction to grant specific performance because the suit is brought by a non-resident assignee of a resident assignor. We shall show that, where the court is vested with jurisdiction for one purpose, it may grant full relief to the complainant. For instance, where a trustee of an express trust may invoke the aid of a national court to protect the trust estate from destruction or damage, he may recover full relief therein, even though, standing alone, a part of that relief could not be administered by such court. The same well-established principle fully answers the present contention of petitioners. The complainant believed that the action of the defendant City was unlawfully as well as unconstitutionally impairing and destroying the trust estate, and that, by reason of an existing contract which was part of that estate, full and adequate relief could be obtained, not alone by injunction, but also by the specific enforcement of

contract rights. It was entitled to bring such an action, and demanded that the Water Company join. That company refused to do so, claiming that the action of the City entitled it to an extension of its contract—something of greater value (in its estimation) to it than the sale of its property. The Trust Company was not required to file a bill asking, even in the alternative, for such a renewal; the Water Company could not be compelled to join as a complainant in a bill asking, even in the alternative, for the specific performance of the contract to purchase. Such a bill might have embarrassed both parties in the maintenance of their respective contentions. If the Water Company refused to join in a suit asking for the dual, and yet only complete, relief of injunction and specific performance, a controversy at once arose, authorizing its joinder as a defendant, although as to one phase of the case—namely, a part of the injunctive relief—the parties might have been in full accord. Certainly, if a refusal by a resident corporation to join as a complainant, solely because it questions the policy of such a suit though its legal interest will be subserved by its success, entitles a non-resident stockholder to invoke the aid of a federal court and join the reluctant company as a defendant (Chicago vs. Mills, *supra*), then, *a fortiori*, does this case present a clear justiciable question which required the joinder of the Water Company as a party defendant in order that full relief might be obtained. If specific performance be, in part, the proper remedy under the existing situation, it was necessary that the Water Company, refusing to become a complainant, should be made a defendant in order that the decree might be of any effect whatsoever.

(2) In Any Event, the Bill Presents a Federal Question over Which the Circuit Court Has Jurisdiction, Independent of the Question of Diverse Citizenship.

Of course, if the bill presents a federal question, then it is entirely immaterial whether the defendant Water Company be a defendant or be aligned with the complainant. Under those circumstances, even if collusion had been shown to exist between the complainant Trust Company and the defendant Water Company, that fact would not defeat jurisdiction of the court.

> "Whether this case comes within the principle laid down by this court in *City of Dawson vs. Columbia Avenue Saving Fund Etc. Co.*, 197 U. S., 178, upon the question of diversity of citizenship, it is unnecessary to determine, because there is, in our opinion, a federal question involved, which gave the Circuit Court jurisdiction to determine the case without reference to citizenship. It is averred in the bill that by reason of the passage of the ordinance of the common council of the city, and the act of the legislature of Georgia passed December 3, 1902, the obligation of the contract set forth in the bill was impaired. It is part of the duty of the federal courts, under the impairment of the obligation of contract clause in the Constitution, to decide whether there be a valid contract and what its construction is, and whether, as construed, there is any subsequent legislation, by municipality or by the

state legislature, which impairs its obligation."

Mercantile Trust Co. vs. Columbus, 203 U. S., 311, 319.

(a) **In ascertaining whether a federal question is presented, the court will not determine whether there was an existing valid contract to be impaired, or whether it has, in fact or in law, been impaired by subsequent legislation. The only question for consideration is whether, according to the face of the bill, it appears that it is in good faith contended that there was such a contract, and that it has been so impaired.**

This proposition has been repeatedly upheld by this court, so that it is not now fairly debatable.

City Railway Co. vs. Citizens Co., 166 U. S., 557, 563.

Ill. Cent. R. R. Co. vs. Chicago, 176 U. S., 646, 656.

Yazoo Etc. Co. vs. Adams, 180 U. S., 1, 15.

Ill. Cent. R. R. Co. vs. Adams, 180 U. S., 28, 36.

Pacific Electric Ry. Co. vs. Los Angeles, 194 U. S., 112, 117.

Mercantile Trust Co. vs. Columbus, 203 U. S., 311, 320.

"There can be no doubt that the Circuit Court had jurisdiction of the case, notwithstanding the fact that both parties are

corporations and citizens of the State of Indiana. It should be borne in mind in this connection that jurisdiction depended upon the allegations of the bill, and not upon the facts as they subsequently turned out to be. The gravamen of the bill is that, under the act of the general assembly of 1861, and the ordinances of January 18, 1864, and April 7, 1880, the Citizens Railroad Company had become vested with certain exclusive rights to operate a street railway in the city of Indianapolis, either in perpetuity or for the term of thirty years or thirty-seven years, which the City had attempted to impair by entering into a contract with the City Railway Company to lay and operate a railway upon the same streets.

All that is necessary to establish the jurisdiction of the court is to show that the complainant had, or claimed in good faith to have, a contract with the city, which the latter had attempted to impair."

City Railway Co. vs. Citizens R. R. Co., 166 U. S., 557, 563.

"The question then is reduced to this: Giving to the charter of the railroad company the broadest construction claimed by it (and in determining the existence of a Federal question, we are bound to do this), may it not be reasonably insisted that, under the act of 1872 and ordinance No. 793, * * * the right of the Railroad Company * * * is impaired? We think it may. Without de-

termining the effect of such ordinance, the question whether it impairs the charter of the company, giving to that charter a broad construction, is fairly open to contention. * * * The claim is certainly not a frivolous one. In determining the existence of a federal question it is only necessary to show that it is set up in good faith and is not wholly destitute of merit."

Illinois Central Railroad vs. Chicago, 176 U. S., 646, 656.

"In those cases the question of jurisdiction was presented on motion to dismiss. In the case at bar it is presented by demurrer, but, however presented, jurisdiction depends primarily upon the allegations of the bill, not upon the facts as they may subsequently turn out, *City Railway Co. v. Citizens R'd. Co., supra*, nor upon the actual sufficiency, in the opinion of the court, of the facts alleged to justify the relief prayed for."

Pacific Electric Ry. Co. vs. Los Angeles, 194 U. S., 112, 118.

"It is part of the duty of the Federal courts, under the impairment of the obligation of contract clause in the Constitution, to decide whether there be a valid contract and what its construction is, and whether, as construed, there is any subsequent legislation, by municipality or by the state legislature, which impairs its obligation."

Mercantile Trust Co. vs. Columbus, 203 U. S., 311, 320.

Knoxville Water Co. vs. Knoxville, 200 U. S., 22, is one of the many cases which could be cited, wherein this court held that a federal question plainly arose by reason of the contention that a city ordinance impaired the obligation of a prior contract, although finally, after accepting jurisdiction, the court held, on the merits, that the contract was not impaired.

(b) Charter amendment, section 264A, and the ordinance 98 of 1910, calling for the bond election, are laws within the meaning of article I, section 10, of the federal constitution, prohibiting laws impairing the obligation of contracts.

At the outset we desire to state most emphatically, as we did in the Court of Appeals, that the laws which this respondent claims impaired the obligation of the contract in question are found in section 264A of the charter of the City and County of Denver, set forth at page 79 of the printed record, and the ordinance passed in pursuance thereof, No. 98 of 1910 (Record, p. 82). We make this statement because much of the opposing brief has been devoted (as it was in the court below) to the assertion that we have contended that the impairing law was Ordinance 163 of 1907; and, having so constructed a fictitious issue, petitioners strenuously endeavor to destroy it. Such a contention has never been made and is purely a figment of the imagination of opposing counsel. The bill specifically charges (Record, p. 22) that the impairment of the contract lies in certain provisions of this charter amendment, section 264A, and in proceedings thereunder. It is true that the bill charges

that the erroneous construction placed upon Ordinance 163 of 1907 by the defendants would render it unconstitutional, but appellee expressly states that such is not the proper construction (Record, p. 16).

Are this charter amendment and the succeeding ordinance (No. 98 of 1910) laws within the meaning of the constitutional prohibition?

The charter which section 264A purports to amend was enacted in pursuance of Article XX of the Colorado Constitution, found in the appendix to petitioners' brief, beginning on page 235, and particularly section 4 thereof. Amendments thereto are authorized by section 5 (petitioners' Brief, p. 241), and under this authority section 264A was adopted. Ordinance No. 98 of 1910, calling the bond election, was required by the express terms of the amendment (Record, pp. 80, 81).

Petitioners do not question that this amendment and the subsidiary ordinance are laws which, if there be a contract, may impair it; and we therefore confine ourselves to the mere reference to authorities which set the matter at rest.

New Orleans Water Works Co. vs. Louisiana Co., 125 U. S., 18, 31.

Walla Walla vs. Walla Walla Water Co., 172 U. S., 1.

St. Paul Gas Light Co. vs. St. Paul, 181 U. S., 142, 148.

Davis vs. Los Angeles, 189 U. S., 207.

Mercantile Trust Co. vs. Columbus, 203 U. S., 311, 320.

Northern Pacific Co. vs. Duluth, 208 U. S., 583, 590.

(c) In order that the charter amendment and succeeding ordinance may have the impairing effect, it is not necessary that the contract in question should be an exclusive franchise for the supplying of the city with water.

This statement certainly seems elementary, but in the court below, as well as by the brief in the present case, petitioners have argued that, unless the contract alleged to have been impaired, granted to the Denver Water Company and its assignee—namely, the defendant Water Company—the exclusive right to supply the City of Denver and its inhabitants with water, it was not the subject of impairment by any subsequent law or ordinance.

A layman listening to or reading such an argument would naturally suppose that the constitutional provision read that "no state shall pass any law impairing the obligation of an exclusive contract to supply a city and its inhabitants with water." Such, of course, is not the meaning or intent of the constitutional provision which prohibits the passage of *any* law which impairs the obligation of *any* contract.

In the great case of Fletcher vs. Peck, 6 Cranch, 87, 137, Chief Justice Marshall, referring to this identical provision, said:

> "The words themselves contain no such distinction. They are general, and are applicable to contracts of every description."

If, as we shall contend, there is an existing contract obligating the City to purchase the water plant in question, or even to submit to a vote of the electors the question of purchasing such plant, which contract

is impaired by charter amendment section 264A, then the latter must fall.

The entire basis for this erroneous theory of petitioners lies in the fact that this court has frequently had occasion to consider whether ordinances of a city providing for the construction of municipal water plants, or granting water franchises to others, impaired the obligation of existing contracts for like service. In considering whether there was such an impairment, the court has investigated the prior contract for the purpose of ascertaining whether there was anything in its terms which deprived the city of the power to construct its own system or to grant a similar right to others. And it has held in certain cases that when such first contract, or the existing law, did not deprive the city of this power, it continued to exist, and therefore by its exercise the original contract was not impaired.

But nowhere has it been asserted that only in such cases may the constitutional provision be invoked for the purpose of protecting a contract from impairment. In none of these cases has the effect of the challenged law upon existing contracts to purchase been under consideration, nor were they cases where, as here, the law, if pursued, would practically, if not legally, deprive the complainant of the means of enforcing his contract.

The proposition is so simple that it cannot be strengthened by arraying the great number of cases which have held that contracts other than exclusive water contracts have been impaired by subsequent legislation; and we shall only fortify our argument by

calling attention to two cases which illustrate the general operation of this constitutional provision.

Reagan vs. Farmers Loan & Trust Co., 154 U. S., 362, 392.

Northern Pacific Co. vs. Duluth, 208 U. S., 583, 589.

The determination by two courts that there is a federal question involved herein is practically conclusive upon the subject.

Both the Circuit Court for Colorado and the United States Circuit Court of Appeals for the Eighth Circuit have held that a federal question is presented by the bill. This fact alone should be conclusive, or at least most persuasive, evidence of the existence of the constitutional question. We make this statement because, as above shown, all that must be established is a *bona fide* claim that a valid contract exists and has been impaired. Certainly, when two courts have scrutinized the record for the purpose of ascertaining whether this be true, the existence of such a question should be conclusively presumed.

II.

THE CONTRACT INVOLVED.

We come now to the proof of the existence of a valid contract to purchase.

By implication, if not expressly, petitioners suggest that the bill does not, by assertions of legal con-

clusions, place upon the various ordinances and contracts certain constructions urged in argument by the complainant trustee. For instance, it is, we believe, stated that the bill does not expressly allege that the effect of Ordinance 44 of 1890, standing by itself, was to require the City to purchase or to renew at the expiration of the twenty-year period. Without conceding the correctness of these assertions, once for all we may dispose of all of them by the bare statement of the equitable principle, that where the bill states all the facts (as the one at bar does) a court of equity will grant the proper relief upon its own conclusions, drawn from the facts pleaded, respecting the contractual obligations of the parties, although such relief may be inconsistent with that prayed for.

> "There is nothing in the intricacy of equity pleading that prevents the plaintiff from obtaining the relief under the general prayer, to which he may be entitled upon the the facts plainly stated in the bill. There is no reason for denying his right to relief, if the plaintiff is otherwise entitled to it, simply because it is asked under the prayer for general relief and upon a somewhat different theory from that which is advanced under one of the special prayers. * * *
>
> We agree that the relief granted under the prayer for general relief must be agreeable to the case made by the bill, and that in substance is what is held by the above cases. The case made by the bill consists of

the material facts therein stated, and where all the facts are stated it is no reason for denying relief under a general prayer, because it may differ from the theory of the law upon which the special prayer for relief is based, where both prayers are based upon the same facts and clearly set forth in the bill."

Lockhart vs. Leeds, 195 U. S., 427, 436.

And to the same effect:

Walden vs. Bodley, 14 Pet., 156, 164.

Tayloe vs. Merchants F. I. Co., 9 Howard, 390, 406.

Texas vs. Hardenberg, 10 Wall., 68, 86.

Mitchell vs. Moore, 95 U. S., 587, 590.

Tyler vs. Savage, 143 U. S., 79, 98.

In National Water Works Company vs. Kansas City, 10 C. C. A., 653; 62 Fed., 853, 863, a case similar to the one at bar, Mr. Justice Brewer said:

"* * * If there were any formal defect,—any omissions or addition of statement necessary to distinctly present the issues and uphold the decree,—an amendment would be permissible at the present time, and in the appellate court. Pleadings in equity cases may be conformed to the proofs; and we have the parties before us, the entire facts of the controversy, and the arrival of the time when a final determination of the rights between them is necessary. No techni-

cal defect in the pleadings should stay the hands of a court of equity."

The rule as to construction of contracts, such as the one involved herein.

Before proceeding to a discussion of the various phases of the contractual relations between the City and the Water Company, we should also dispose of an argument of petitioners, constructed upon an array of this court's decisions, that grants by states or municipalities of special franchises or privileges are subject to strict construction, and all ambiguities are to be resolved in favor of the public. That rule is now unquestioned and unquestionable in cases where the claim is made that an exclusive or other extraordinary right, contrary to the public interest, was granted, and therefore the public body has "divested itself of its powers." (Knoxville Water Co. vs. Knoxville, 200 U. S., 22, 38.) But this court has never been called upon to apply, and has never applied, the rule to a contract involving the purchase by a city at a fair valuation of an existing water plant or other public utility. In insisting that the City is obligated to purchase, we are asserting no special or unusual privilege adverse to the public interest. On the contrary, the complainant says that the defendant City (which apparently desires to embark in municipal ownership of a water plant) should acquire that plant at an appraised value of its true worth under its existing contract so to do. Such a contract entered into by the City in its business or proprietary capacity, and which, if carried out, will give the City

what it pretends to want, is subject to the same rules of construction which govern contracts between man and man.

In National Water Works Co. vs. Kansas City, 10 C. C. A., 653; 62 Fed., 853, the Circuit Court of Appeals of the Eighth Circuit, speaking through the late Mr. Justice Brewer, was considering a contract made by the city of Kansas City in 1873, whereby it agreed to purchase the water plant of the complainant at the expiration of the twenty-year contract, if it did not renew; and in disposing of a contention respecting the strict construction of public grants, that distinguished jurist said (p. 863):

> "It is unnecessary to attempt to define the peculiar quality of the title held by the company, nor do we question the rule of construction of public grants; but all contracts involving property rights and obligations between municipalities and individuals must be presumed to be based upon and to recognize the ordinary laws of business transactions, and, if any departure therefrom is contemplated, such departure must be clearly manifested."

We have said that in the making of such a contract the City acts in its business or proprietary capacity. This is undoubtedly true. In Walla Walla vs. Walla Walla Water Co., 172 U. S., 1, 8, this court recognized the dual character of municipal powers in this language:

> "It may be conceded as a general proposition that there is a substantial distinction

> between the acts of a municipality as the agent of the State for the preservation of peace and the protection of persons and property, and its acts as the agent of its citizens for the care and improvement of the public property and the adaptation of the city for purposes of residence and business."

In Illinois Trust & Savings Bank vs. City of Arkansas City, 22 C. C. A., 171, 181; 76 Fed., 271, 282, is found perhaps the clearest discussion of the subject—an opinion rendered by Judge Sanborn, and concurred in by Judges Caldwell and Thayer. After an elaborate discussion of the question, it was said (76 Fed., 282):

> "In contracting for water works to supply itself and its inhabitants with water, the city is not exercising its governmental or legislative powers, but its business or proprietary powers. The purpose of such a contract is not to govern its inhabitants, but to obtain and provide benefit for the city itself and its denizens."

Under a variety of circumstances, the various federal courts (and state courts as well) have followed this rule in considering contracts between muicipalities and the owners of public utilities.

> Safety Insulated Wire Co. vs. Mayor, etc., 13 C. C. A., 375, 377; 66 Fed., 140, 143, 144.
>
> Willis vs. Board of Com'rs, 30 C. C. A., 445; 86 Fed., 872.

Los Angeles City Water Co. vs. Los Angeles, 88 Fed., 720.

Speer vs. Board Co. Com., 32 C. C. A., 101; 88 Fed., 749, 758.

Cunningham vs. City of Cleveland, 39 C. C. A., 211; 98 Fed., 657, 663.

Little Falls Co. vs. City of Little Falls, 102 Fed., 663, 665.

Los Angeles City Water Co. vs. Los Angeles, 103 Fed., 711, 730.

Board of Com'rs vs. Geer, 47 C. C. A., 450; 108 Fed., 478, 481.

City Water Supply Co. vs. Ottumwa, 120 Fed., 309, 311.

Omaha Water Co. vs. City of Omaha, 77 C. C. A., 267; 147 Fed., 1, 5.

Southern, etc. Co. vs. Mobile, 162 Fed., 523, 531.

City of Winona vs. Botzet, 94 C. C. A., 563; 169 Fed., 321, 333.

Wykes vs. City Water Co., 184 Fed., 752.

City of Des Moines vs. Welsbach Co., 110 C. C. A., 540; 188 Fed., 906.

And this distinction has been observed by the federal and state courts of Colorado for the purpose of preserving the inviolability of contracts entered into by the cities and towns of that state for the purpose of securing a water supply or lighting the streets of the city, etc.

Pike's Peak Power Co. vs. Colorado Springs, 44 C. C. A., 333; 105 Fed., 1.

Colorado Springs vs. Colorado City, 42 Colo., 75.

City of Cripple Creek vs. Adams, 36 Colo., 320.

City of Denver vs. Hubbard, 17 Colo. App., 346.

Leadville Illuminating Gas Co. vs. Leadville, 9 Colo. App., 400.

In Pike's Peak Power Company vs. City of Colorado Springs, *supra,* there was involved a franchise or contract granted and entered into by the city with the power company's assignor, whereby the right to utilize the water of the municipal plant was granted for the period of twenty-five years. The city, in endeavoring to avoid the contract, alleged that it held its waterworks in its political or governmental, as distinguished from its proprietary or business, capacity, and that a city council could not enter into an agreement relative thereto which might not freely be revoked by a succeeding administration. The court (speaking by Judge Sanborn) decided adversely to the contention, using the following language (p. 10):

> "Another position urged by counsel for the appellee is that the system of waterworks of this city, its streets, parks, and public grounds, are held by the municipality in its political or governmental, and not in its proprietary or business, capacity; that, consequently, they cannot be diverted from municipal uses, and a city council cannot make any agreement or contract relative to them which a succeeding council may not freely annul. The proposition is not novel. It has

received the careful consideration of this court, and, so far as the question it presents is material to the issues in this case, it is no longer open to debate here. In Illinois Trust & Savings Bank vs. City of Arkansas City, 76 Fed., 271, 282, 22 C. C. A., 171, 181, 40 U. S. App., 257, 276, 34 L. R. A., 518, 525, this court announced its conclusion in these words:

'A city has two classes of powers,—the one legislative, public, governmental, in the exercise of which it is a sovereignty and governs its people; the other, proprietary, quasi private, conferred upon it, not for the purpose of governing its people, but for the private advantage of the inhabitants of the city and of the city itself as a legal personality. In the exercise of the powers of the former class it is governed by the rule here invoked. In their exercise it is ruling its people, and is bound to transmit its powers of government to its successive sets of officers unimpaired. But in the exercise of the powers of the latter class it is controlled by no such rule, because it is acting and contracting for the private benefit of itself and its inhabitants, and it may exercise the business powers conferred upon it in the same way, and in their exercise it is to be governed by the same rules that govern a private individual or corporation. [Citing many cases.] In contracting for water works to supply itself and its inhabitants with water, the city

is not exercising its governmental or legislative powers, but its business or proprietary powers. The purpose of such a contract is not to govern its inhabitants, but to obtain a private benefit for the city itself and its denizens.' [Citing cases.]

The purpose of the city in making the contract of September 8, 1898, was to enlarge its waterworks, to increase its supply of water, and to furnish itself and its inhabitants with electric light. In contracting for these purposes the city was exercising its proprietary or business powers. It is controlled by the same rules that govern a private corporation, and its contract bound its successive sets of officers."

In City of Colorado Springs vs. Colorado City, 42 Colo., 75, the Supreme Court of the state had under consideration a contract whereby, in consideration of the grant of a right of way through the streets of Colorado City, the city of Colorado Springs had agreed to furnish water from its mains to Colorado City and its inhabitants. The validity of the contract was challenged by Colorado Springs, but the court overruled its contention, holding that the cities in making the contracts were exercising their proprietary powers, as distinguished from their legislative or governmental powers, and in support of that conclusion approved the Pike's Peak Power Company case, *supra.*

In City of Cripple Creek vs. Adams, 36 Colo., 320, the city of Cripple Creek was seeking to escape from the obligation of certain bonds issued for the

purpose of supplying water to that municipality. It was alleged that the legislature had not conferred upon cities the power of incurring bonded indebtedness for that purpose, and it was also contended that no appropriation ordinance had been passed before the bonds were issued. The Supreme Court of the state overruled each of these contentions, saying (pp. 325, 327):

> "Section 4403, subdivision 6, 2 Mills' Ann. Stats., empowers towns and cities to contract an indebtedness on behalf of the city and upon the credit thereof by borrowing money or issuing bonds of the city for the purpose of purchasing or constructing water works for fire and domestic purposes, and for the purpose of the construction or purchase of a canal, or canals, or some suitable system of supplying water for irrigation in the city or town. As incidental to this power, and to make it effective, the city has, by express legislative enactment, the right of condemnation; the power to construct and purchase reservoirs; the power to provide pumps and conducting pipes and ditches; the power to take water from the public streams of the state, and the power to purchase water and water rights for the purpose of supplying themselves with water.—2 Mills' Ann. Stats., Sec. 4403, subdivisions 70, 72 and 73. Also, Secs. 4440a, b and c, 3 Mills' Ann. Stats., Revised Supplement.
>
> The legislature, when it gave the municipalities of this state power to purchase

or construct a system of water works, undoubtedly intended to give them every power necessary to effectuate such general power. We judicially know that, in many instances, this general power would amount to nothing unless there went with it the power to purchase water rights of earlier priorities than the city could acquire by diversion and appropriation. We think the town of Cripple Creek had authority under said section 4403 to issue bonds for the purchase of water rights; therefore, that such recitals in the bonds were not fatal to the bonds or coupons issued and attached thereto.

* * * * * *

It is next contended that no appropriation ordinance had been passed before the bonds were issued, as required by sections 4447 and 4449, 2 Mills' Ann. Stats. The bonds and coupons involved are not within such statutes. Leadville Illuminating Gas Company vs. The City of Leadville, 9 Colo. App., 400, 402-3."

In City of Denver vs. Hubbard, 17 Colo. App., 346, the contract was one entered into by the City of Denver, under the charter existing in 1890, from which we shall hereinafter quote, and providing for the lighting of the streets of the City for a period of ten years, at a fixed price, the City reserving the right to purchase the lighting plant at certain designated periods. It was contended by the City that this contract was in excess of its charter powers, but after an elaborate review of the authorities the court

held the contract valid, and that it did not come within the prohibition of the charter with respect to contracts in excess of appropriations; and further held (p. 368):

> "The execution of this and similar contracts is in the exercise by a municipality of its contractual, its private, proprietary or business powers, so to speak, and not of its governmental or delegated legislative powers; hence it is in our opinion not liable to the charge that the execution of the contract would for the term thereof operate as a surrender of the legislative power of the city council."

In Leadville Illuminating Gas Co. vs. City of Leadville, 9 Colo. App., 400, the contract assailed by the city was one whereby the gas company agreed for a period of twenty-five years to light the streets and public places of the city. The suit was brought to recover annual payments due under this contract. After pointing out that the statutes of the state authorized cities and towns to light their streets and public places, the court held that no prior appropriation by the city was necessary or essential to the validity of the contract, and that it was valid in every respect.

(1) Under Ordinance 44 of 1890, the City was required to purchase at the expiration of the twenty-year period, on April 10, 1910, if it did not renew, as the Circuit Court of Appeals held.

The opinion of the Circuit Court of Appeals now before this court (Record, pp. 335-347; 187 Fed., 890) reaches the conclusion announced in the present heading. We shall not set forth this opinion at length, because, of course, it will be carefully read and considered in its entirety by this court. We need only say that therein his Honor Judge Hook states succinctly, and yet most lucidly, the various provisions of the ordinance, the situation of the parties at the time, many of the acts of the City construing the contract, and the pertinent legal principles applicable thereto. That opinion, in so far as it reaches the conclusion stated in this heading, is, we think, fully justified by the facts and the law, and we might well rest upon it as a complete exposition of this branch of the case. But there were other matters before the Court of Appeals, which should be brought to the attention of this court in connection with a review of that opinion.

(a) The terms of Ordinance 44, considered in the light of conditions existing at the time of its enactment, compel this conclusion. Such construction does not render the contract ultra vires.

So far as this appellee Trust Company is concerned, it bases no contractual rights upon ordinances or contracts preceding Ordinance 44 of the Series of

1890. It is that ordinance which, either standing alone or taken in connection with subsequent proceedings, to be developed in argument, constitutes the basis of the contract which the bill seeks not only to enforce, but to protect against unconstitutional invasion and impairment. This ordinance was passed by the City Council of the City of Denver and approved April 10, 1890. The grantor therein, City of Denver, was at the time a municipal corporation, acting under a special charter from the legislature of the state, and was the principal municipality afterwards included within the incorporation of the defendant City and County of Denver by Article XX of the state Constitution. Whatever obligations or duties were imposed by Ordinance 44 upon the City of Denver were by the express language of section 1 of this Article XX transferred to the consolidated corporation. (Petitioners' Brief, Appendix, p. 235.)

The grantee in Ordinance 44 was The Denver Water Company, which, according to the alleged and admitted facts, subsequently assigned by mesne conveyances all of its rights, privileges and contracts, including said Ordinance 44, unto the defendant Water Company. So that beyond any question the defendant City and the defendant Water Company are the parties obligated by any contracts contained within this particular ordinance.

In order to intelligently discuss the meaning, effect and obligations of this ordinance, it is necessary to understand—

The powers which were vested in the City of Denver at the time of the passage of the ordinance in 1890, respecting the supplying of the City with water,

and also the powers vested in the City Council of said City in that behalf.

"The legislative power of the City of Denver shall be vested in a city council, consisting of a board of aldermen, to be elected one from each ward, and a board of supervisors, five in number, to be elected from the city at large."

Denver Charter, Session Laws 1885, p. 76; Art. II, sec. 1.

"The City Council shall have the management and control of the city finances and all property of the corporation, real, personal and mixed, and shall have power by ordinance: * * *

Fifty-seven—*To provide the city with water,* to erect hydrants and pumps, to construct cisterns, *to provide for and regulate water for irrigation purposes and other purposes;* to regulate and provide for the construction of ditches, canals, conduits and gutters for conducting and distributing water through the city, and to keep the same in repair; and to acquire and own stock in any ditch company, the ditch of which supplies any part of the city with water for irrigating or domestic purposes; to regulate the use of water by the inhabitants of the city for irrigating the soil; *to build and construct reservoirs for the storage of water, and ditches outside of the city limits, for the pur-*

pose of bringing water from streams and such reservoirs into the city for the use of the inhabitants thereof, in such way and manner as shall be deemed for the best interests of the city, and to keep the same in repair; *and to acquire, by purchase or condemnation proceedings, under the general laws of the State, water and ditch rights,* and sites for parks and public buildings within the city, *or between the city and the source from which the water is taken;* and to such condemnation proceedings the possession of franchises by any water or ditch company shall be no bar upon the legal compensation being tendered and paid; to bore artesian wells for the purpose of obtaining water for the city at such places within or without the city as may be procured for that purpose, and prevent the wasting of artesian water from private wells; *to construct or purchase water works for the use of the city, and to enlarge their capacity from time to time and keep the same in repair, and generally do whatever may be needful and necessary to be done in order to supply the city with water for fire, irrigating, domestic and other purposes, and regulate the same.*"

Denver Charter, Session Laws 1885, pp. 81-86 (Art. II, sec. 20), as amended by Laws 1889, p. 128.

"The City Council shall have the power to make all ordinances which shall be neces-

sary and proper for carrying into execution the powers specified in this Act."

Denver Charter, Session Laws 1889, p. 129 (amending Art. II, sec. 21, as found in Session Laws 1885, p. 87).

"All franchises or privileges hereafter granted by the city of Denver to corporations or individuals, shall be limited to twenty years from the granting of the same, and such franchises or privileges so granted shall plainly specify on what particular streets, alleys, or avenues the same shall apply to, and no franchises or privileges shall hereafter be granted by the city of Denver in general terms or to apply to the city generally."

Denver Charter, Session Laws 1889, p. 130, sec. 23 (new section).

The Colorado Constitution effective in 1890 limited the indebtedness by loan of any city to a certain amount, but provided that—

"Debts contracted for supplying water to such city or town are excepted from the operation of this section."

Colorado Constitution, Art. XI, sec. 8.

1 Mills' Statutes, p. 333.

It thus appears that at the time of the passage and approval of Ordinance 44 of 1890, the City of

Denver, acting solely through its City Council, had the absolute, unrestricted power to supply the City and its inhabitants with water. It is true that as to franchises granted to private parties there was a provision that they should be limited to the period of twenty years from the date of the grant. Such limitation, however, would not under any circumstances or in any wise affect the power of the City to make a contract for the immediate purchase of a water plant by the City, or a contract providing for the purchase of such a plant from a private individual at any reasonable time in the future. Applying this statement to the case at bar, there was no reason why the City might not lawfully grant a franchise or contract to the Denver Water Company for a period of twenty years and provide therein for the purchase of such plant by the City at the expiration of the term at its fair value. Such a contract would be in effect the exercise of the powers expressly granted "to provide the City with water" and "to construct or purchase water works * * * and generally do whatever may be needful and necessary to be done in order to supply the City with water for fire, irrigating, domestic and other purposes;" such construction being through the medium of a contractor who was given the operation of the system for a period of twenty years in consideration of the postponement of the payment of the contract price until that time. If this could lawfully be done so as to impose an absolute liability to purchase at the expiration of that period, *a fortiori* might the City contract for such purchase, but provide a means of escape from the obligation, by inserting an alternative clause for the ex-

tension or renewal of the term of the contract as a consideration for its release from the purchase obligation.

While the terms of the sections of the charter above set forth put this power of the City beyond reasonable controversy, the judicial decisions of the Circuit Court of Appeals for the Eighth Circuit in the *Pike's Peak Power case, supra,* and of the Supreme Court of Colorado in the opinions above mentioned, confirm in emphatic terms the full power of a Colorado city, in its proprietary as distinguished from its political capacity, to make provision for an ample supply of water and other public utilities, not merely for the present requirements of the city, but for the future, and to enter into contracts for a long term of years for the purpose of executing the general powers conferred by law. Thus the Supreme Court said, in considering similar powers granted to cities not organized under special charter:

> "The legislature when it gave the municipalities of this state power to purchase or construct a system of water works, undoubtedly intended to give them every power necessary to effectuate such general power."
>
> City of Cripple Creek vs. Adams, 36 Colo., 320, 325.

Petitioners contend that an ordinance granting a franchise to supply water for a period of twenty years, with a contract upon the part of the City to purchase at the expiration of that period if an extension be not granted, would be so extraordinary as to render the contract thereby created *ultra vires* and

void. But such contracts had frequently been made prior to 1890. In fact, at the very time that Ordinance 44 was enacted, similar contracts were in effect in Kansas City and Los Angeles, and like grants had previously been made in other communities.

National Water Works Co. vs. Kansas City, 10 C. C. A., 653; 62 Fed., 853.

Los Angeles Water Co. vs. City of Los Angeles, 88 Fed., 720; S. C., 177 U. S., 558.

Stein vs. Bienville Water Supply Co., 34 Fed., 145; S. C., 141 U. S., 67.

City of Duluth vs. Duluth Gas & Water Co., 45 Minn., 210.

It is natural to suppose that the existence of such contracts in other large western cities was well known to the officials of Denver and the contracting water company in the year 1890.

But it is said that in certain of the cases just cited there was express legislative authority authorizing or ratifying such contracts. To a certain extent and in certain of these cases that is true, but this circumstance does not militate against the point we now urge, that such contracts as we assert the City of Denver made in 1890 were not at that time extraordinary or deemed unreasonable by young and growing cities in the West.

As to the Kansas City case above mentioned, 62 Fed., 853, it does appear that the act of the legislature of Missouri expressly authorized the contract therein under consideration, which was substantially the same character of contract we assert was created

by Ordinance 44 of 1890. Mr. Justice Brewer did not have occasion in that case to discuss the right of the city to enter into the contract, had it not been for the statute which authorized it.

In Los Angeles Co. vs. Los Angeles, 88 Fed., 720, the Circuit Court for the Southern District of California did have occasion to express its opinion upon general powers granted to a city (similar to those conferred by the Denver charter) to enter into long-term contracts. In that case it appeared that in 1868 the city of Los Angeles entered into a contract under which it leased its municipal water plant for a period of thirty years, with certain provisions for minimum rates and the agreement that at the expiration of the term the plant should be returned to it upon its payment to the lessee of the value of all improvements placed upon the property. It does appear that after this contract was entered into the legislature of California passed an act ratifying it, but it is manifest from the decision of the Circuit Court that such contract was deemed to be valid independent of this ratifying statute. The court, speaking through Judge Wellborn, called attention to the powers granted to the city by statute, and said (88 Fed., on 731):

> "The words of the grant in the case at bar, 'power * * * to provide for supplying the city with water,' are clear and unambiguous, and, in my opinion, admit of no other reasonable construction than that they were intended to confer upon the City of Los Angeles, so far as concerns the means to supply the city with water, *powers as ample as the legislature itself possessed.*"

In Duluth vs. Duluth Gas & Water Co., 45 Minn., 210, a contract by the city whereby it granted the exclusive right to supply the inhabitants with water for a period of thirty years, with a provision that it would purchase the works at the expiration of the contract should an extension be denied, was unquestioned and upheld by the Supreme Court of Minnesota.

Construing a similar general grant of power to a municipality to supply itself and its inhabitants with water, the Circuit Court of Appeals of the Eighth Circuit, speaking through Judge Sanborn, in Illinois Trust & Savings Bank vs. City of Arkansas City, 76 Fed., 271, 282, said:

> "The powers granted to this city by the legislature of the State of Kansas to contract for and procure waterworks are plenary and unlimited save by the duty to exercise them with reasonable discretion, and it is not the province of a court to contract or clip the legislative grant."

If, as was held in the Los Angeles case (which was affirmed by this court in 177 U. S.), such a grant of authority to municipalities confers upon them all the powers which the legislature itself could by statute express, then it follows that the mere absence of a Colorado statute specifically authorizing such a contract as is now under consideration would not affect the validity thereof.

This court has said, in considering the question of supplying municipalities with water:

> "And as the object to be attained was a public one, for which the State could make provision by legislative enactment, the grant of the franchise could be accompanied with such exclusive privileges to the grantee, in respect of the subject of the grant, as in the judgment of the legislative department would best promote the public health and the public comfort or the protection of public and private property."
>
> New Orleans Water-Works Co. vs. Rivers, 115 U. S., 674, 681.

As an example of a Colorado contract of similar character, we refer, in passing, to Castle Creek Water Co. vs. City of Aspen, the decision of which on appeal is reported in 146 Federal, 8. This case will be the subject of further consideration at the appropriate place in the argument.

But it is charged in the opposing brief that if such a contract could be made, then it would be within the power of the City to bind itself to purchase waterworks at several times their real value. Similar suggestions of imaginary, unreasonable and corrupt contracts are made for the purpose of defeating the right of a municipality to enter into a perfectly fair and reasonable one. Such arguments are the favorite refuge of the legal sophist in attempting to avoid statutes, ordinances and contracts. But they are destroyed by a moment's reflection. A general authority vested in municipal officers to enter into a contract presupposes that their discretion will be honestly exercised. The requirement of good faith al-

ways conditions and limits the exercise of municipal functions, and corrupt contracts entered into under the guise of conferred power would not be permitted by any court to stand. The contract which we assert was created in the instant case is entirely devoid of all evidences either of corruption or of unfairness. An adequate supply of water was essential to the lives and health of the inhabitants of Denver. In 1890 the City was not prepared to undergo the vast expenditure which would be required if it were to undertake this duty itself. It was therefore necessary that it contract with another for this essential service. In order to attract capital to embark in the more or less hazardous engagement, and particularly expensive in Denver's case, a provision had to be made either for a continuance of the privilege or for the taking over of the plant at the expiration of the twenty-year period. This contract of purchase, found in section 11 of Ordinance 44, was entirely fair from the City's standpoint, and honorable from that of the Company. If the parties could not agree upon the purchase price of the plant, the same was to be determined by disinterested arbitrators. True, the City was bound to purchase at such appraised valuation, but we know of no reason why a City acting in its proprietary capacity should be more reluctant to pay a fair consideration for property it desires to purchase than is a private individual. Outsiders, viewing the expressions of animosity upon the part of the citizens of Denver, evidenced by section 264A, and other matters of record herein, might well doubt whether its inhabitants were really actuated by a desire to pay fair compensation for what they receive;

but such unfortunate display of municipal unfairness is not justified by any principle of law or equity.

Petitioners cite in opposition to the validity of such a contract the case of City of Clay Center vs. Clay Center Light & Power Co., 78 Kan., 390. In that case the court held that, as the city council was without authority to grant a franchise for a period exceeding twenty-one years, it "was, likewise, powerless to impose a valid burden upon the city as a penalty for refusing to do the act which the statute prohibited it from agreeing to do. That which the city was forbidden to do directly it could not accomplish by evasion and indirection." We respectfully submit that the court proceeded upon wrong premises and necessarily reached a wrong conclusion. It did not undertake to say whether the city would have had the power to enter into a binding contract of purchase at the end of the grant. We may assume that a city may not do indirectly what it is prohibited from doing directly; but when a city has the power positively to engage to do a certain thing, it necessarily has the power to provide that if it does something else (which it may not lawfully engage in advance to do), it will be excused from performing its lawful obligation.

Having shown beyond question, we believe, that the City had the power to enter into a contract definitely to purchase, if it did not extend, we pass to the next point for consideration, namely:

The circumstances of the parties at the time Ordinance 44 of 1890 was enacted.

> "It is a fundamental rule that in the construction of contracts the courts may

look not only to the language employed, but to the subject-matter and the surrounding circumstances, and may avail themselves of the same light which the parties possessed when the contract was made."

Merriam vs. United States, 107 U. S., 437, 441.

Also:

Scott vs. United States, 12 Wall., 443, 445.

United States vs. Union Pacific Co., 91 U. S., 72, 79.

United States vs. Gibbons, 109 U. S., 200, 203.

C. R. I. & P. Ry. Co. vs. D. & R. G. R. R. Co., 143 U. S., 596, 609.

Walker vs. Brown, 165 U. S., 654, 668.

And, in determining the question of the reasonableness of such agreements upon the part of municipalities,

"the contract should be construed, not in the light of developments that have since been made, but with reference to the conditions which confronted the parties at the date of the contract. The fact that said contract, because of the rapid growth of the City of Los Angeles, has proved largely remunerative to the complainants does not make the contract unconscionable."

Los Angeles etc. Co. vs. City of Los Angeles, 88 Fed., 720, 735.

See also to the same effect:

United States vs. Union Pacific Co., 91 U. S., 72, 81.

Illinois Trust & Savings Bank vs. Arkansas City, 76 Fed., 271, 283.

Referring, then, to the situation of the parties when Ordinance 44 of 1890 was enacted:

The Denver Water Company and the City of Denver, the two parties to this contract, were not strangers to each other. Contractual relations respecting water supply already existed between them. These were the subject of presentation by the defendant Water Company to the Circuit Court of Appeals in the case at bar, and doubtless will be presented by that company to this court in its brief and in support of its cross-bill. As the Trust Company is not basing its claims upon any of those antecedent contracts or relations, we shall not discuss them or mention them further, except to say that it is important to keep in mind the preceding relationship of the parties to Ordinance 44. The City had, in 1890, full power to erect or purchase municipal waterworks, but it was not then prepared to engage in an enterprise of that magnitude and involving such large expenditures. The problem of securing a water supply for Denver, as the bill avers, differed then and still differs from that which confronts eastern cities. The only available sources of supply are the mountain streams, having widely variant flow depending on the seasons, which must be tapped many miles from the city in order to avoid the contamination of their waters occurring along their lower and more accessible courses.

The affidavit of the witness Robinson (Record, p. 188), which stands undisputed, clearly states what the situation was on April 10, 1890, and for a considerable period prior thereto. Considerable apprehension existed in the City concerning the obtaining of an adequate supply of water. The City was rapidly growing. Up to that time the waterworks operated in Denver had obtained their supplies from the direct flow of the streams in the immediate vicinity of the City, but, owing to the scarcity of water in said streams at certain seasons of the year, there was a threatened water shortage confronting the immediate future of Denver. It was evident to the City and its inhabitants that, if it was to continue to grow, some provisions should be made for increasing the supply and for the construction of an adequate system of storage which might impound the flow when it was available, for subsequent use during the periods of low water. It was evident that, to accomplish these requirements, various conduits and distributing mains and reservoirs should be constructed at a very large cost. It was in the light of all of these conditions that Ordinance 44 of 1890 was enacted and accepted. It has been upon the faith of the construction we now invoke that millions of dollars have been expended in extending and improving the water system in order that it might meet, not only the present necessities of the City, but its requirements for a reasonable number of years to come.

The terms of Ordinance 44 of 1890.

We have shown that the City had the power to make such a contract; we have shown the conditions

which existed, which required a contract sufficiently fair and equitable to attract capital to the large undertaking; and we now proceed to show that Ordinance 44 itself justifies the construction we place upon it. It is found beginning at page 31 of the Record.

Section 1 granted the right and privilege of laying, continuing and maintaining water pipes, etc., for the conveyance and distribution of water through certain streets, avenues, alleys and public places of the City of Denver and its additions (specifying them),

> *"to such extent as the City may lawfully grant the same, subject to be terminated in the manner hereinafter in this ordinance provided."* (P. 34.)

Section 2 contained the agreement of the City that whenever it should be requested so to do, it would make a grant

> *"to such extent as it lawfully may* to said The Denver Water Company, its successors and assigns, of the same rights mentioned in section 1 hereof in and upon any streets hereafter laid out or extended, and will also, whenever requested, *make such additional and confirmatory grants to said The Denver Water Company, its successors and assigns, of the rights and privileges mentioned in section 1 hereof, as it may at the time have the lawful right and power to make;* all of such further additional and confirmatory grants,

if made, *to be subject to termination in the manner in this ordinance hereinafter specified.*" (P. 34.)

But the only provisions of any character respecting the termination of the franchise or contract contained in said ordinance, and undoubtedly referred to in the above-quoted provisions, are found in section 11, which reads:

"Sec. 11. At the expiration of the period of twenty years from and after the date of the passage and approval of the ordinance, in case the city shall then elect so to do, the said works may be purchased by the said city, and in case the parties can not agree, after such election, upon the price to be paid by the city for the water works of the said company, its successors and assigns, then their fair cash value shall be determined by arbitration, by five disinterested persons, none of whom shall be residents of Denver, two of them to be chosen by the city, two by the company, and the fifth by the four first chosen, and in case of failure on the part of the company to name arbitrators for the period of thirty days after the city shall have named arbitrators and notified the company so to do, the city may apply to any court having equity jurisdiction in the county in which the city of Denver shall then be situated for the appointment of two persons of the qualifications aforesaid as such arbitrators, and the court may thereupon appoint

two such persons, who shall act with the same force and effect as if appointed by the company, and the decision of a majority of said board shall be final and binding upon both parties, and upon the payment, or tender of payment, by said city the said company shall convey to said city all of its property, real or personal, easements, rights and privileges, and thereafter all franchises, rights and privileges which have been at any time theretofore granted said company, its successors or assigns, and which it may then possess, shall cease and be at an end." (Record, p. 36.)

The succeeding section provides for a renewal of the contract:

"Sec. 12. At the expiration of the said period of twenty years the said city may, at its election, renew the contract [erroneously printed 'contracts' at p. 36 of the Record] hereby made, by ordinance to that effect, for a like period of twenty years, but at a price for hydrant rental 10 per cent. less than mentioned in section 10 hereof, for the period remaining after the ten years after May 1st, 1891, and for successive periods of twenty years at the price last aforesaid, as often and as long as the city may choose. This section is conditioned, however, upon the full performance by the city of the provisions of section 2 hereof." (Record, pp. 36-37.)

Section 14 provided that the company, its successors or assigns, should at all times "during the existence of this contract, or any renewal thereof, furnish and supply to the city, water free of charge" for certain purposes.

Section 19 provided that the ordinance when accepted by the Water Company should become a contract between the City and the Water Company,

> "its successors and assigns, and the same shall as to every provision herein contained as fully bind and inure to the benefit of the successors and assigns of the said The Denver Water Company as to the said company. And it is expressly understood that by the acceptance of this ordinance, the said The Denver Water Company loses no rights in regard to the occupation of the streets, alleys and public places, or as to the rights of any other person or persons thereto which it now possesses, but the same are hereby recognized and confirmed and are to be deemed independent of and not merged in any grant in this ordinance elsewhere contained."

Section 20, which has a most important bearing upon the controversy, reads as follows:

> "Sec. 20. All mains, pipes, valves and other apparatus now owned by said The Denver Water Company, and composing its plant, and all such mains, pipes, valves, hydrants and other apparatus as said The Denver Water Company, its successors or as-

signs, shall hereafter lay down or set in or upon any of the streets, alleys or other public places within said city shall be and remain the sole and absolute property of said The Denver Water Company, its successors and assigns, and the said The Denver Water Company, its successors or assigns, *shall forever be considered and entitled to be in possession thereof, except in case of purchase by said city under the terms of this ordinance, or some agreement between said city and said company,* its successors or assigns, when all rights of whatsoever nature of said company, its successors or assigns, in and to the subject-matter hereof shall vest in said city."

Section 21, so much relied upon by the petitioners, is in the following language:

> "Sec. 21. While the consideration for the respective agreements of the city and the company are upon each side the several agreements of the other, all of the several grants, contracts and agreements in this ordinance contained are to be deemed independent agreements with the same force and effect as if each section of this ordinance was contained in a separate ordinance by itself."

In replying to the contention made in one portion of the opposing brief (although completely overlooked and repudiated in discussing other phases of the case), that the construction we place upon this

ordinance is not admissible in view of section 21, we cannot do better than to extract the following from the opinion of the Circuit Court of Appeals in answer to the same argument presented to it (187 Fed., 890, 897, Record, p. 341):

> "But section 21, upon which the city relies, provides that the several contracts and agreements in the ordinance shall be deemed independent with the same force and effect as if each section 'was contained in a separate ordinance by itself,' and the city contends that the above construction of sections 11 and 12 is therefore inadmissible. That section 21 was not intended to destroy all interrelation and dependency among the various parts of the ordinance is shown by its prefatory recital that the 'consideration for the respective agreements of the city and the company are upon each side the several agreements of the other.' There are other evidences to the same effect. For example, section 12, which provides for a renewal of the contract refers specifically to section 10 for the hydrant rentals that were to be reduced, and the concluding sentence of section 12 provides that the section is conditioned 'upon the full performance by the city of the provisions of section 2 hereof,' while section 2 in turn refers to section 1. Section 8 connects in necessary sense with section 7, and also refers to the subsequent parts of the ordinance, and so on. Moreover, there is a general relation and connection of context

and subject-matter throughout the entire ordinance, and even if each section were a separate ordinance by itself they would still be read in pari materia as forming parts of a connected whole. Section 21 may reasonably be given due effect by construing it as intended to preserve the contract as a whole against the failure of some part of it in point of law. In this connection it may be noted that certain provisions of section 5 as to water rates after the first five years were held by the Supreme Court of Colorado to be unenforceable. Denver v. Water Co. 41 Colo. 77, 91 Pac. 918."

Considering, as we must, the ordinance as a whole, because all of its provisions are interrelated and refer one to the other, it clearly appears that no provision whatsoever is made for the termination of the contract, save solely in event of a purchase. The City repeatedly says that the rights granted are to such extent as the City may lawfully grant the same, and subject to be terminated only in the manner provided by the ordinance; and this view is further upheld by the provision of section 20, that the Water Company, its successors or assigns, "shall forever be considered and entitled to be in possession thereof [the plant, pipes, etc.], except in case of purchase by said city under the terms of this ordinance or some agreement between said city and said company," etc.

But disregarding all pertinent provisions of the other portions of the ordinance, petitioners isolate and emphasize the language of section 11, that "in case the city shall then elect so to do, said works may

be purchased by the said city." It is said that the word "may" is permissive only. A similar argument is employed respecting the same word in section 12. The answer to this is that it is a well-settled principle, applicable to the construction of statutes, ordinances or contracts, that where the context or other circumstances require it, the word "may" shall be construed as "must," and will be given a peremptory significance.

Supervisors vs. United States, 4 Wall., 435, 446.

City of Galena vs. Amy, 5 Wall., 705.

United States vs. Cornell Steamboat Co., 202 U. S., 184, 192.

Northwestern &c Co. vs. Keith, 23 C. C. A., 196; 77 Fed., 374, 375.

Village of Kent vs. United States, 51 C. C. A., 189; 113 Fed., 232, 237.

Thus, in Supervisors vs. United States, *supra*, this court, in construing the word "may," said (the italics being ours):

> "The conclusion to be deduced from the authorities is, that where power is given to public officers, in the language of the act before us, or in equivalent language—whenever the public interest or *individual rights* call for its exercise—the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person the law requires shall be done. The power is given, not for their bene-

fit, but for his. It is placed with the depositary to meet the demands of justice. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless."

The case of Castle Creek Water Co. vs. City of Aspen, in the Circuit Court for Colorado, reported on appeal to the Circuit Court of Appeals in 76 C. C. A., 516; 146 Fed., page 8.

It is evident from an examination of this Ordinance 44 of 1890 that its construction must be based largely upon independent reasoning, rather than upon citations of numerous authorities. The contract is in a sense *sui generis,* and little precedent can be found involving agreements of similar character. But fortunately there is a case which bears a striking likeness to the one at bar, and which was instituted in the Circuit Court for Colorado and subsequently appealed to the Court of Appeals for the Eighth Circuit. The case was Castle Creek Water Company vs. City of Aspen, the opinion on appeal being reported in 146 Fed., 8. In that suit Hon. Charles S. Thomas (who until very recently has been one of the solicitors for petitioners in this suit, and who joined in filing the petition for certiorari in this court), and also the present city attorney of Denver, acted as attorneys for the Castle Creek Water Company; and it is important to the present controversy, because of the construction therein placed upon the contract of a Colorado city, by such excellent lawyers; also by his honor, Judge Hallett, who decided the case in the Circuit Court; and also by the Court of Appeals.

The suit was brought by the Castle Creek Company against the city of Aspen upon an alleged contract to purchase the plaintiff's water system, it being alleged that the city had elected to purchase, but afterwards failed to appoint appraisers, as provided by the contract, and the prayer was that the court should cause the property to be appraised for the purpose of completing the sale. It was also alleged that an ordinance passed by the city council, providing for constructing a municipal water plant, was unconstitutional because impairing complainant's contract (though the latter was not alleged to be exclusive), and proceedings thereunder were sought to be enjoined.

The contract in that case, which was originally granted to Cowenhoven and Brown, took the form of a written offer by them to the city, and an acceptance by the city through an ordinance. Our reference will be to the record and briefs in that case as filed in the Court of Appeals. The accepted offer granted the two individuals the right to build and operate a waterworks system for the term of twenty years, and provided:

> "Section 10. The town shall have the right to purchase the said works at the expiration of twenty (20) years after the date of this agreement, or failing to purchase at the expiration of 20 years, then at the expiration of every ten years thereafter.
>
> Provided, however, that the town shall give to the said Cowenhoven and Brown, their associates and assigns, notice in writing of their intention to purchase one (1)

year in advance of such date of purchase.

In the event of the town and said Cowenhoven and Brown, their associates or assigns, failing to agree upon the value and price to be paid for said works the same is to be determined by five experts, two to be appointed by the town, two by said Cowenhoven and Brown, their associates or assigns, and the four so selected to appoint a fifth. The said parties so appointed to take and subscribe an oath to fairly and impartially value the said works and may examine experts on the behalf of each party, and upon this testimony and actual view of the works they shall declare the then present value of the works, rights and privileges, it being distinctly understood that the valuation is to be based upon the productive worth of the works and not upon the original cost thereof."

The ordinance accepting this offer provided, *inter alia:*

"And said proposition is hereby accepted and made a binding contract between the Town of Aspen and the said H. P. Cowenhoven and D. R. C. Brown and said contract and this ordinance shall constitute and define the authority and right of said Cowenhoven and Brown, and their associates and assigns.

Section 7. The grant contained in this ordinance and all the rights, privileges and

immunities hereinbefore provided for, shall be and continue in force for a period of 20 years from the 31st day of October, 1885."

It will be observed that the contract did not expressly provide for any extension of the franchise at the expiration of the term of twenty years. Any such provision for an extension must be implied from the section above quoted, which gave to the town the right to purchase the plant at the expiration of twenty years, or "at the expiration of every ten years thereafter." However, the complainant, through its attorneys, took the position in its bill that this ordinance gave the plaintiff the right to an extension in event that the town failed to purchase, the allegation in this respect being:

"And your orator further complaining, alleges that, had the defendant failed or neglected to adopt and serve the notice of its purpose and intention to purchase its said plant and water works one year previous to the expiration of said period of twenty years, provided in and limited by said contract, your orator would have applied for *and could under said contract and the statute in such case made and provided have secured a renewal* of all the rights, privileges, franchises and conditions therein contained by applying therefor and securing the same for an additional period of ten years from and after the expiration of said contract and agreement, but your orator saith and charges the fact to be that the said de-

fendant by its acceptance of its reserved right to purchase under said agreement as hereinbefore set forth as aforesaid, prevented and concluded your orator from so doing. Your orator having relied as it was bound to do upon said notice and acceptance and upon the good faith and purpose of the defendant in adopting the same and serving notice thereof as aforesaid upon your orator that if the defendant be now permitted to disregard said acceptance and to repudiate the same, your orator being unable to renew or extend its contract and agreement with the said defendant for an ensuing period, its business will be ended, the value of its plant and system destroyed, *and it will be compelled to dispose of the same to the defendant at its own terms, to its great, lasting and irreparable damage and injury.*"

Furthermore, it was alleged in the bill:

"That its right of renewal was a right and asset of great value which was dependent upon the defendant's refusal to purchase and was lost by its notice of acceptance of said privilege of purchase."

Judge Hallett dismissed the bill upon the ground that the court could not specifically enforce the agreement to appoint appraisers, and also because the plaintiff had an adequate remedy at law. He was of the opinion, however, that an action could be maintained to recover the value of the property under the contract to purchase, and held that there was a duty resting upon the town to purchase in case the right

of Cowenhoven and Brown should be at any time denied to continue business, saying in this connection:

> "Cowenhoven and Brown made a proposal to provide the town of Aspen with water for domestic purposes and for extinguishing fires and the like, which proposal was accepted by the town. In the tenth section of the proposal the town was given the right to purchase the works to be built at the expiration of 20 years after the date of the agreement, or failing to purchase at the expiration of 20 years, then at the expiration of every ten years thereafter.
>
> It was said in argument that this provision in respect to the purchase of the property by the town was not carried into the ordinance by which the town accepted the proposal. But the fact is not so. The sixth section of the ordinance by which the town accepted the proposal declared that said proposition is hereby accepted and made a binding contract between the town of Aspen and the said H. P. Cowenhoven and D. R. C. Brown, and said contract and this ordinance shall constitute and define the authority and rights of the said Cowenhoven and Brown, their associates and assigns. Section 7 declares that the rights granted Cowenhoven and Brown shall continue for a period of 20 years, and counsel seem to have taken this as a limitation of the other clause; but it is no limitation whatever. The proposal of Cowenhoven and Brown was accepted in all

its parts by the town and the works were built under that proposal.

* * * * * * * *

The water works were, as has been stated, constructed at the instance of the town of Aspen and by contract with the town. It was public service to be performed by Cowenhoven and Brown—supplying the water to the town for domestic and other uses. The works themselves were incorporated in the town and pipes laid in the streets by permission of the authorities of the city. The ordinance which was passed in October, 1885, conferring the right to lay pipes and the like, declared the jurisdiction of the town over the entire works—all within the town and all without the town. So it may be said that the whole system was incorporated into the town. And it is work that could be used for no other purpose. No vendee could come to take this property except with the consent of the town. The town provided for the purchase of the property in the contract which was made. The terms of the contract were such as to indicate that the business of supplying water would be continued indefinitely with Cowenhoven and Brown or the works would be purchased by the town.

Under such circumstances there is no difficulty in saying that there was a duty resting upon the town to purchase in case the right of Cowenhoven and Brown should be at any time denied to continue the business." (Italics ours.)

Ex-Governor Thomas and Mr. Bryant, in their brief, referred to the alternative obligations upon the part of the city, in the following language:

> "The primary and essential purpose of the agreement as finally consummated was to supply the town of Aspen and its inhabitants with a prime necessity of municipal and individual life, with water for fire and domestic purposes. We have a right to assume that the town could not itself supply this want and that Messrs. Cowenhoven and Brown could and would supply it, provided they could do so upon terms that would promise a profit on one hand, and safeguard themselves and their assigns against ultimate loss on the other. Hence they were willing and offered to erect and operate a system for that purpose *for twenty years, provided that at the end of that period the town would purchase it, or, failing to do so according to some agreed plan, to extend their rights and franchises for not less than twenty more years*, subject to such right to purchase *at the expiration* of every ten years thereafter. For it is obvious that they did not contemplate a shutdown after the first twenty years had ended, and an option to the town to purchase in 1915, a mere ten years' extension of their franchise; else the term *'every* ten years' would not have been employed to define the right. They demanded definite valuable considerations for their expenditures, among which was a sale in twenty years to the town or a satisfactory extension

subject to sale, to the option of the town at the expiration of definite decennial periods." (Italics ours.)

And again:

"*The right to purchase reserved to the town by section 10 was a most important feature of the agreement.* It was mutually so. The town, by exercising the right, could substitute itself for the owners and operate the system to the satisfaction of the community's ideas and demands, or, by declining so to do, could impose other and from its standpoint more liberal terms as to operation and service. The appellant was limited as to the future of the property by the existence of the option and the consequences of its exercise, *but possessed the alternative advantage of a new lease of life consequent upon the failure or refusal of the town to exercise it.* The town could not, or in any event it was right to assume that it could not, accept the option and then by refusing to perform it destroy the alternative. *To do this would be to use the agreement for the confiscation,* as we shall see, and not for the purchase of the appellants' property." (Italics ours.)

And again:

"We contend that the essential features of the contract are the securing of a needed water supply for the town of Aspen; the construction of water works therefor by the appellant's grantors; the right to operate them

for twenty years; the right of appellee to purchase them at the close of that period on notice previously given, and the right of appellant to a renewal of the franchise for not less than twenty years more *if such notice to purchase be not given. It was these things the parties had in contemplation when the contract was made.* Each party desired to safeguard itself as to them." (Italics ours.) And again:

"It does not avail the appellee that it might not have acted upon its option. Appellant, of course, held its contract subject to that contingency. But if it had not been exercised the appellant would have had a year in which to have sought to renew its franchise *which the city impliedly agreed to do in the covenant for an option to purchase at the next ten-year period.*" (Italics ours.)

The Court of Appeals, speaking through Judge Sanborn, held that the contract should be specifically performed through a master's valuation and therefore reversed the decree, but it clearly indicated that, under the contract, if the city did not elect to purchase, the water company was entitled to a new franchise.

It would be difficult to conceive of a case having more direct application to the controversy now being discussed than has this Castle Creek suit. While the contract there involved merely provided that "The town shall have the right to purchase the said works at the expiration of 20 years after the date of this

agreement," and while there was no provision in the contract for an extension of the franchise except as such was impliedly stated in the grant of the right to purchase at the expiration of every ten years succeeding the first twenty years, nevertheless the counsel of record for the defendant city in this litigation, and Judge Hallett, stood upon common ground, the one successfully asserting, and the other determining, that there was an obligation to purchase in event of a failure to renew. And this decision was in face of the fact that at the time of the grant of the ordinance to Cowenhoven and Brown there was an express Colorado statute (not, however, applicable to Denver) providing that—

> "When the right to build and operate such water or gas works is granted to private individuals or incorporated companies by said cities and towns, they may make such grant to inure for a term of not more than twenty-five years," etc.
>
> 2 Mills' Annotated Stats., sec. 4403, Subdiv. 69, p. 2294.

(b) Contemporaneous construction of the contract by both parties fortifies this conclusion.

We come to a consideration of the practical construction of this contract by the respective parties thereto, and particularly by the City of Denver. It is unnecessary to enter into any prolonged citation of authorities establishing the rule that such contemporaneous construction is not only important, but frequently a decisive influence.

"If there were any doubt or ambiguity arising upon the words employed in the clause of the contract under consideration, they would be effectually removed by this practical construction continuously put upon them by the conduct of the parties for so long a period.

'In cases where the language used by the parties to the contract is indefinite or ambiguous, and hence of doubtful construction, the practical interpretation of the parties themselves is entitled to great, if not controlling, influence. The interest of each generally leads him to a construction most favorable to himself, and when the difference has become serious and beyond amicable adjustment, it can be settled only by the arbitrament of the law. But in an executory contract, and where its execution necessarily involves a practical construction, if the minds of both parties concur, there can be no great danger in the adoption of it by the court as the true one.' *Chicago v. Sheldon*, 9 Wall., 50, 54, *per* Mr. Justice Nelson."

Topliff vs. Topliff, 122 U. S., 121, 131.

Petitioners, realizing the importance of the rule we invoke, seek to meet it by the assertion that it does not operate against municipalities. But this court has held otherwise, by applying the principle against the city of Chicago, the District of Columbia

and the Territory of Hawaii, in cases involving the construction of their respective contracts.

Chicago vs. Sheldon, 9 Wall., 50, 54.

District of Columbia vs. Gallaher, 124 U. S., 505, 510.

Lowrey vs. Hawaii, 206 U. S., 206, 222.

Other courts, in construing municipal contracts such as franchises, have followed this same doctrine.

Ill. T. & S. Bank vs. Arkansas City, 22 C. C. A., 171; 76 Fed., 271, 292.

City of Detroit vs. Detroit Ry. Co., 56 Fed., 867, 904.

Henry vs. Mason City etc. Co., 140 Iowa, 201.

City of St. Louis vs. Laclede Gas Light Co., 155 Mo., 1.

The record now before this court, both by undenied allegations of the bill and cross-bill as well as by affidavits and documentary evidence presented at the injunction hearings, establishes beyond doubt that, from the date of the enactment of Ordinance 44, the original grantee Water Company and its successors, including the defendant Water Company, have always construed the ordinance as requiring the City to purchase or to extend, and have adhered to such position, *and that the City has concurred therein.*

For example, the cross-bill avers that, relying upon this obligation of the City, the defendant Water Company has invested large sums of money—to-wit, many millions of dollars—in the acquisition, completion and enlargement of the waterworks system,

> "all with the knowledge and consent of said the City and County of Denver (which then and there well knew the claims and understanding of this defendant as to its contract rights aforesaid and assented thereto and concurred therein) and the inhabitants thereof." (Record, p. 138.)

The affidavit of Mr. Robinson, general manager of the Water Company (Record, pp. 188, 189), after setting forth this construction placed upon the ordinance, states that the City of Denver and its successor, the City and County of Denver, has at all times had knowledge, as affiant was informed and believes, of such understanding and construction, and "until very recently has not dissented therefrom, but, on the contrary, has acquiesced and concurred therein."

All of these things stand without a syllable of contradiction or denial, and must be taken as true. Mr. Robinson further states that he was connected with The Denver Water Company at the time of the passage of the ordinance, and has ever since been connected with that company and its successors. He states that on April 10, 1890, the date of the approval of the ordinance, Mr. W. A. Underwood was connected with The Denver Water Company in a legal capacity, and in the year 1891 he became a member of the board of directors, and the president and general counsel, of the company which had succeeded to the rights of The Denver Water Company. He says that in the preparation of said ordinance the interests of the Water Company were looked after by said

Underwood, and that "when said ordinance was finally agreed upon and enacted the said Underwood advised The Denver Water Company that in, by and under the terms of said ordinance the City would, at the expiration of the period of twenty years therein mentioned, be obligated either to purchase the water works system or plant, as therein contemplated, or in lieu thereof, to renew the contract evidenced by said ordinance for an additional period of twenty years." Mr. Underwood is now deceased, and consequently no direct testimony could be secured from him.

But the record contains even more convincing proof that this was the construction always placed upon this ordinance by the defendant City and its predecessor, until very recently, when the present policy of confiscation and oppression, evidenced by section 264A of the charter, was embarked upon. One of the clearest and most specific municipal acts of construction respecting the obligation of the City to purchase the water plant in question in event that it did not extend the contract or franchise, is found in Ordinance 54 of the Series of 1894, passed by the City Council of the City of Denver, the same body which had enacted Ordinance 44 of the Series of 1890. This ordinance was approved on December 15, 1894, within two months subsequent to the acquisition of the contract and waterworks by the defendant Company, and to the execution of the mortgage under which the appellee Trustee claims.

This ordinance of 1894 is found at page 210 of the record. It recited that, whereas the City of Denver was the owner of certain water pipes and appa-

ratus situate in the town of South Denver (see map, Record, p. 235), then annexed to the City of Denver, and it was admitted to be for the best interest of the City to lease such pipes to The Denver Union Water Company, therefore the ordinance leased unto that company all of such pipes for and until the 10th day of April, 1910 *(which the court will note was the date of the expiration of the twenty-year period specified in Ordinance 44 of 1890).* Provision was made for the fixing of the rental by arbitration, and for the pressure to be furnished by the Water Company through such pipes. Section 3 of the ordinance then provided that upon the termination of the lease, either by expiration or otherwise, all new construction made by the Water Company, its successors and assigns, during the leasehold period, should be appraised in a manner specified therein, and the value fixed by such appraisement should be conclusive, and should be paid by the City to the Water Company, its successors and assigns, upon the termination of the lease, if the City before such appraisement was made, elected to purchase such new construction. The section then continued (p. 211):

> "*In the event of the City of Denver concluding not to purchase such new construction* then the Denver Union Water Company, its successors and assigns, shall purchase the pipes and mains of the City of Denver then being in the streets, avenues and alleys in the territory formerly known as the town of South Denver, at the appraised value thereof; and in such event, the City of Denver shall select two appraisers,

and the Denver Union Water Company shall select two appraisers, and the four thus chosen shall select a fifth appraiser, and the value of said pipes and mains so fixed by a majority of said appraisers to be conclusive; and the said The Denver Union Water Company shall within sixty days after the appraising of said pipes, mains, hydrants, and pumping machinery, pay such appraised value to the city of Denver, and receive from said city of Denver a conveyance of such pipes and mains, *and the city of Denver within the sixty days of the said last named appraisement, to grant to the said The Denver Union Water Company, its successors or assigns, a franchise to operate and maintain said plant and water system in the said territory of South Denver upon the same terms specified in ordinance No. 44 of the series of 1890 of the city of Denver,* the rates to be charged under such ordinance or franchise to be the same as charged *during the term of such franchise in other portions of the City of Denver,* and any restrictions, limitations, *and conditions that may be imposed upon the said the Denver Union Water Company, its successors or assigns, at that time, shall apply equally and be made a part of the franchise* proposed to be granted in said new territory." (Italics ours.)

What, then, was the construction placed by the City upon Ordinance 44 of the Series of 1890? The town of South Denver, previously amalgamated into

the City of Denver, constituted only a portion of the consolidated city, and it is clearly apparent that this particular ordinance was intended to establish the rights of the contracting parties with respect to South Denver upon a parity with the obligations and rights of the same parties under Ordinance 44 of the Series of 1890. This ordinance of 1894 expressly provided that the City of Denver should, if it did not purchase the new construction at the end of the twenty-year period specified in Ordinance 44 of 1890, grant to the company a new franchise to operate in the territory of South Denver upon the same terms specified in Ordinance 44 of the Series of 1890, and with all limitations and conditions imposed upon the Water Company at that time. In other words, the City recognized its obligations under Ordinance 44 of 1890 to purchase the water plant or to grant a new franchise, and Ordinance 54 of 1894 was adopted in order that the rights of the respective parties in South Denver should harmonize with their main contractual obligations. We submit that this solemn and formal construction of the obligations of the parties, occurring sixteen years ago, must have practically controlling weight in the present construction of Ordinance 44.

We now refer to the letter written by ex-Governor Thomas, until very recently one of the solicitors for the present petitioners, to Hon. R. W. Speer, mayor of the City of Denver, under date of March 3, 1908. Mr. Thomas was then retained by the City, or about to be so retained, in connection with the appraisement proceedings under Ordinance 163 of 1907, hereinafter to be mentioned, and he had been called upon by the mayor to express his opinion respecting Ordinance

44 of 1890. The letter is found at page 213 of the record. Governor Thomas analyzes the various sections of Ordinance 44, quoting the language of sections 1 and 2, providing for the grant "to such extent as the city may lawfully" do, and says, at page 214 (the italics being ours):

> "The rights and privileges granted by Sections 1 and 2 *are absolute, far reaching, and unconditional. They can be terminated only in the manner provided by the ordinance,* but the ordinance provides no right or method of termination other than the election by the city to purchase the works under the provisions of Section 11. *This impression is confirmed by the recitals of Section 20, which provide that all apparatus then owner or thereafter laid in or set in or upon any streets, alleys or other public places, should be and remain the sole and absolute property of the water company, its successors and assigns, 'which shall forever be considered and entitled to be in possession thereof except in case of purchase by said city under the terms of this ordinance,* or some agreement between the said city and said company, its successors or assigns, in and to the subject-matter hereof, shall vest in said city.' It would seem to follow that if, on April 10, 1910, the city should decline to affirmatively exercise its election to purchase the rights and privileges granted under said ordinance, the latter would not be terminated unless the city and the com-

pany under Section 20 could arrive at some agreement between themselves.

But the power of termination in such event would rest entirely with the company, whose assent to any arrangement would be imperative, and therefore subject to such terms as it might impose."

And, continuing:

"It will be noted also that if the city should elect under Section 11 to purchase the water works, that election concludes it. *By such election the contract of purchase is made.* The subsequent ascertainment of value is merely a detail. The board of arbitrators must be chosen, and the city is obliged to pay the company and the company is obliged to receive whatever sum may be awarded as the valuation. In other words, the election once made, the city could not, if it would, recede from its contract, however exorbitant the value might be."

After discussing the provisions of section 12, respecting renewal, Governor Thomas concludes (p. 216):

"However this may be, I can safely affirm that Ordinance No. 44 is one of the most shrewdly drawn, carefully prepared and thoroughly effective instruments for the creation, *continuance* and safeguarding of private rights and privileges I have ever seen. It is difficult to suggest its possible

improvement for such purposes. It practically stripped the city of every safeguard, and the right of election to purchase, which is grudgingly given, rigidly binds it to the bargain however extortionate the price may be. I am informed that at the time the ordinance was adopted the most strenuous efforts were made to eliminate this solitary protective feature.

It is needless to add that the appraisement procedure for the purchase of the plant contained in the ordinance of Sept. 17, 1907, whereby the award of the appraisers is not conclusive, but wholly subject to the approval of the popular vote, is far preferable to the scheme of purchase outlined in the previous contract, and that the interests of the city are best conserved by determining the question of values of the company's water system in advance of the tenth day of April, 1910."

Here again is another construction of Ordinance 44 by a representative of the City, over thirteen years after the formal construction thereof by the City Council through the medium of Ordinance 54 of the Series of 1894.

(c) The City's conduct estops it from otherwise contending.

We have asserted that the acts and conduct of the City, alleged and proven in the record, constitute in and of themselves a construction of the ordinance

of 1890. But they, and the acts and expenditures of the Water Company induced thereby, are of such character as to constitute not merely construction, but an estoppel *in pais* as well. After twenty years' acquiescence—yes, active joinder—in this construction of Ordinance 44; after millions of dollars have been expended by the Water Company in increasing and improving its waterworks in order to carry out its own obligations, it would be such a breach of good faith and honest dealing to permit the City to succeed in its eleventh-hour recantation that a court of equity will estop it from now changing front and assuming a contrary position.

The principles applicable to estoppel control municipalities as well as individuals, as this court and the Supreme Court of Colorado have both held.

> Beadles vs. Smyser, 209 U. S., 393, 402.
>
> Colorado Springs vs. Colorado City, 42 Colo., 75, 88.

See also:

> Illinois Trust & Savings Bank vs. Arkansas City, 22 C. C. A., 271; 76 Fed., 271, 293.

> "That the principles of right and justice, upon which the doctrine of estoppel *in pais* rest, are applicable to municipal corporations, is recognized by text writers and in well-considered cases. In 1 Dillon on Municipal Coroprations (4th ed.), in a note to Sec. 417, that learned author says:
>
> 'Any positive acts (*infra vires*) by municipal officers which may have induced the

action of the adverse party, and where it would be inequitable to permit the corporation to stultify itself, by retracting what its officers had done, will work an estoppel.'

* * * * * *

As we have said, the principles of natural justice and fair dealing are alike applicable to municipal corporations as to individuals, * * *.

Beadles vs. Smyser, 200 U. S., 393, 402-405.

In City of Colorado Springs vs. Colorado City, 42 Colo., 75, the contract under consideration was one whereby, in return for a right of way for the water pipes of the city of Colorado Springs through the streets of Colorado City, the former agreed that the latter might use, for proper consideration, the water passing through the pipe lines laid in such streets. The contract had been carried out for a long period of years, and the court held that the city of Colorado Springs was estopped from questioning the validity or the regularity of the authorization of the contract in suit, saying (p. 88):

"The doctrine of estoppel in pais applies to municipal corporations as well as to individuals.—Mouat Lumber Co. vs. Denver, 21 Colo., 1; Town of Fairplay vs. Park Co., 29 Colo., 57; Arapahoe County vs. City of Denver, 30 Colo., 13.

The defense of equitable estoppel may be asserted against a municipal corporation when the character of the action and the

facts and circumstances are such that justice and equity demand that the corporation should be estopped.—Dillon on Municipal Corporations (4th ed.), 675.

Justice and equity require that Colorado Springs be estopped and that she should perform the contract acquiesced in for so long a period according to its terms. * * *."

The general principles of equitable estoppel have nowhere been more clearly announced and more strictly applied than by this tribunal.

Morgan vs. Railroad Co., 96 U. S., 716, 720.

Dickerson vs. Colgrove, 100 U. S., 578, 580.

Baker vs. Humphrey, 101 U. S., 494, 499.

Kirk vs. Hamilton, 102 U. S., 68, 76.

Leather etc. Bank vs. Morgan, 117 U. S., 96, 108.

"The appellee insists that the record discloses a case of estoppel *in pais*, and that the appellant is thereby barred from maintaining the claim which he seeks to enforce in this litigation. The principle is an important one in the administration of the law. It not unfrequently gives triumph to right and justice where nothing else could save them from defeat. It proceeds upon the ground that he who has been silent as to his alleged rights, when he ought in good faith to have spoken, shall not be heard to speak when he ought to be silent. * * *

He is not permitted to deny a state of things which by his culpable silence or misrepresentations he had led another to believe existed, and who has acted accordingly upon that belief. *The doctrine always presupposes error on one side and fault or fraud upon the other, and some defect of which it would be inequitable for the party against whom the doctrine is asserted to take advantage.*" (Italics ours.)

Morgan vs. C. & A. M. R. Co., 96 U. S., 716, 720.

"The estoppel here relied upon is known as an equitable estoppel, or an estoppel *in pais*. The law upon the subject is well settled. The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both. This remedy is always so applied as to promote the ends of justice."

Dickerson vs. Colgrove, 100 U. S., 578, 580.

" * * * We are of opinion that the present case comes within the reasons upon which rest the established exceptions to the general rule that title to land cannot be extinguished or transferred by acts *in pais* or

by oral declarations. 'What I induce my neighbor to regard as truth is the truth, as between us, if he has been misled by my asseveration,' became a settled rule of property at a very early period in courts of equity. The same principle is thus stated by Chancellor Kent in Wendell vs. Van Rensselaer, 1 Johns. Ch., 344: 'There is no principle better established in this court, nor one founded on more solid considerations of equity and public utility, than that which declares, that if one man, knowingly, though he does it passively, by looking on, suffers another to purchase and expend money on land under an erroneous opinion of title without making known his own claim, shall not afterwards be permitted to exercise his legal right against such person. It would be an act of fraud and injustice, and his conscience is bound by this equitable estoppel.'

* * * * * *

* * * Knowing that the defendant's claim to the premises rested upon that sale, he [plaintiff] remained silent while the latter expended large sums in their improvement and, in effect, disclaimed title in himself. He was silent when good faith required him to put the purchaser on guard. He should not now be heard to say that that is not true which his conduct unmistakably declared was true and upon the faith of which others acted."

Kirk vs. Hamilton, 102 U. S., 68.

In Illinois Trust & Savings Bank vs. Arkansas City, 76 Fed., 271, to which we have alluded on other branches of the case, and which involved a contract between a city and a water company respecting the municipal water supply, Judge Sanborn said (p. 293):

> "There is another and a conclusive reason why this city cannot maintain any of the defenses it has interposed in this suit. It is that it cannot accept the benefits and repudiate the burdens of its contract. It is that it cannot be heard to deny the truth of the representations of the existence and of the execution of this contract, which its records and its conduct have constantly made, and in reliance upon which, the Gas Company and the Water Company constructed and extended the water works, and the bank and the bondholders loaned their money. No principle is more universal in the jurisprudence of civilized nations, no principle is more equitable in itself, or more salutary in its effects, than that no one may, to the damage of another, deny the truth of statements and representations by which he has purposely or carelessly induced that other to change his situation. This principle is equitable, because it forbids the untruthful or culpably negligent deceiver from profiting by his own wrong, at the expense of the innocent purchaser or contractor who believed him. It is salutary, because it represses falsehood and fraud. [Citing many cases.] This principle is as applicable to the transactions of corporations as to those of

individuals. As Mr. Justice Campbell well said in Zabriskie v. Railroad Co., 23 How. 381, 400, 401, in which the supreme court held that a corporation was estopped to question the validity of its void guaranty, because it had permitted the circulation of the bonds that carried it:

'A corporation, quite as much as an individual, is held to a careful adherence to truth in all their dealings with mankind, and cannot, by their representations or silence, involve others in onerous engagements, and then defeat the calculations and claims their own conduct had superinduced.' "

(d) The City, having failed to renew at the expiration of the twenty-year period, is firmly obligated to purchase. The ordinance was not nullified by 41 Colorado.

But little further need be said in support of the first portion of the proposition just announced. If by Ordinance 44 of 1890 the City was, as we assert, bound either to purchase or to extend, then it follows, we believe, that its failure to extend the grant at the expiration of the twenty-year period operated automatically to bind the City to the purchase. This follows from the argument we have already made. The contract to purchase was a lawful agreement, and, as viewed by the complainant Trustee, the obligation was absolute unless the alternative was pursued by the City; namely, the renewal of the grant.

It is true that the Circuit Court of Appeals, after reaching the opinion that this ordinance required the

doing of one or the other of these two things, said (187 Fed., 903):

> "Though the time is past there has been neither renewal by ordinance nor purchase. True, the Trust Company says the city elected to purchase and the Water Company says it elected to renew, but the facts are stated upon which these claims are based and it does not appear to us that the city has done either."

What the court meant was that, by affirmative act, the City had neither purchased nor renewed. The language was not intended to mean that, by operation of law and without affirmative action by the City, it had not elected to purchase. In a later portion of this brief we shall disagree with the court, in so far as it holds that the City has not by its affirmative conduct elected to purchase. Upon the present point it is not necessary to question the language so employed.

Certainly, if the contract required the City at the expiration of the twenty-year period to purchase or to renew, there must be some means of enforcing the obligation; otherwise it would be nugatory. That method is to require the City to complete its contract of purchase, lawful when made and still lawful, even though there be no method whereby the City might be compelled to renew. In other words, a court of equity has the power to compel the specific performance of the contract to purchase, although it might not be able to require the City to take such action as would constitute a renewal of the contract.

The decision of the Supreme Court of Colorado in City of Denver vs. Denver Union Water Co., 41 Colo., 77, does not affect the validity of Ordinance 44 of 1890.

A contention is made by petitioners that the decision of the Supreme Court in the above case has the effect of totally invalidating Ordinance 44 of 1890; at least of so impairing that ordinance as to make the renewal contract an impossibility. Assuming, for the purpose of the argument only, that the effect of this decision would be to make it impossible to *renew* the contract in all its terms, that situation would not in any wise affect the obligation of the City to purchase, which does not in any wise depend upon the enforceability or validity of section 5 of the ordinance, respecting rates, which was the only section under consideration in the 41st Colorado.

We purpose to show, however, that such decision does not affect, and was not intended by that court to affect, the validity of Ordinance 44 or any of its provisions, except the proviso in section 5 which we shall presently mention.

A reference to that case will indicate the following situation:

Section 5 of Ordinance 44 provided as follows (Record, p. 34):

> "Sec. 5. The rate to private consumers for water shall not be greater than now charged by said The Denver Water Company, a schedule of which rates is hereto annexed, marked Schedule A, and the said The Denver Water Company may require any

consumer to furnish a meter and pay for water by meter measurement; *Provided, however, That at any time after five years from date, the city council may require said company to fix schedule rates for private consumers equivalent to the average rate prevailing in the cities of Chicago, St. Louis and Cincinnati for the same service.*"

In the year 1895 the City Council of Denver passed a resolution purporting to require the defendant Water Company, assignee of the original grantee, to fix a schedule of rates in accordance with the proviso in the above-quoted section 5 and equivalent to the average rate prevailing in the three cities therein mentioned. The litigation, terminating in the above-mentioned opinion of the state Supreme Court, was instituted by the City to require the Company, among other things, to establish such rates. The suit was brought to *enforce* the contract, not to have it declared *invalid.* Without going into a full discussion of the various issues raised in the case, it suffices to say that the court held that, by reason of the widely variant bases employed by the three cities of Chicago, St. Louis and Cincinnati in establishing rates, it would be impossible to reach an average of the charges for water in effect in those cities; saying (41 Colo., on 101):

> "From our examination of the testimony in this case we are of the opinion that section 5 of the ordinance is unenforceable, in that it is utterly impossible to arrive at an equivalent of the average rate prevailing

> in the three cities mentioned for the same service, due to the fact that the schedules of rates prevailing in the three cities are based upon such radically different classifications and methods of computation, such a diversity of uses and services, and are so largely determined by the judgment and discretion of employees of the water departments, whose duty it is from time to time to inspect, survey and assess the premises to which the water is furnished, and upon the reports of these employees the rates to be paid by the consumers are calculated by the employees of the office upon the schedules of rates prevailing."

It will be seen that the court did not hold section 5 or any portion thereof invalid, but merely held that the proviso respecting the average rates of these three cities was unenforceable, although the chief justice was of the opinion that its provisions were "enforceable" (p. 113).

Nothing in the court's opinion intimates that the result was to destroy Ordinance 44 of 1890. Nor was that opinion considered by anyone as in any wise affecting the ordinance, except to render the proviso of section 5 unenforceable. This opinion was rendered about July, 1907. On October 2, 1907, very shortly thereafter, Ordinance 163 of 1907, hereinafter referred to, was adopted (Record, pp. 69, 78). The Supreme Court's opinion was then fresh in the minds of all parties, and if it had been construed as nullifying Ordinance 44 of 1890, there would naturally have been inserted some expression to that effect in Ordi-

nance 163 of 1907. On the contrary, that ordinance in almost every section refers to and affirms the existence of Ordinance 44 of 1890, and provides for an appraisement of the property in accordance with the terms of section 11 thereof. We shall not now refer to these many allusions to Ordinance 44, because they will be the subject of discussion under the next succeeding topic. The effect, then, of Ordinance 163 of 1907 was to ratify and affirm the preceding ordinance, and if the latter had been in any wise impaired by the Supreme Court's decision, such ratification fully revived it.

But not only did this Ordinance 163 recognize the existence of Ordinance 44, but in March of 1908, about six months after the decision in question, ex-Governor Thomas, then special counsel for the City and County of Denver, and until very recently its counsel in the case at bar, and conceded by all to be a lawyer of great ability, was called upon to render to the mayor his opinion respecting Ordinance 44 of 1890. He did so most exhaustively (Record, p. 213). Not one word in that opinion intimates that the ordinance had been invalidated or annulled by the Supreme Court's decision. It was referred to not only as a living thing, but as "one of the most shrewdly drawn, carefully prepared and thoroughly effective instruments for the creation, continuance and safeguarding of private rights and privileges I have ever seen." This opinion of Mr. Thomas begins with the statement:

> "The contract *now in force* between the city and county of Denver and the Denver Union Water Company is officially styled Ordinance No. 44 of the series of 1890."

Nothing further need be said in support of the proposition that the decision of the Supreme Court of Colorado not only does not affect Ordinance 44, in so far as that ordinance requires a purchase, but does not in any wise impair its *validity* for any purpose.

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(2) Assuming, arguendo, that Ordinance 44 of 1890 in and of itself does not require a purchase (if no extension be granted), nevertheless, by reason of the enactment of Ordinance 163 of 1907 and the proceedings thereunder, the City is obligated to purchase.

Petitioners insinuate in their brief that this Ordinance 163 of 1907 constituted an entirely new agreement, abrogating in terms, or at least in effect, Ordinance 44 of 1890 and the rights thereby granted, particularly the provisions therein respecting the purchase of the plant of the Water Company. If it be contended that such is the position of the complainant Trustee, petitioners are entirely mistaken. Or if their position is, not that this complainant makes such contention, but that such is the purport and effect of Ordinance 163 of 1907, they are equally in error. This ordinance does not purport in any wise to annul any of the rights or obligations imposed upon either party by Ordinance 44 of 1890. On the contrary, those rights are repeatedly recognized, and the appraisement made after the passage of Ordinance 163 is by the very terms of that instrument an appraisement, not under and by virtue of Ordinance 163, but in pursuance of section 11 of Ordinance 44 of 1890.

Let us first see what is the undenied allegation of the bill respecting this Ordinance 163:

It is alleged (Record, p. 12) that shortly prior to October 2, 1907, the defendant Water Company, at the instance and request of the defendant City, agreed to waive, and, so far as it was empowered so to do, did waive, the provision contained in section 11 of Ordinance 44 of the Series of 1890, to the effect that the City could not exercise its right to purchase the waterworks and plant, or cause an appraisement thereof to be made for that purpose, until the expiration of twenty years from and after April 10, 1890. Thereupon, at the instance of the City and with the consent of the Water Company, Ordinance 163 of 1907, approved October 2, 1907, was adopted, and has ever since been effective, so far as it could be effective in view of the relations between the defendant City, the defendant Water Company and the present appellee, complainant in the bill.

It is further alleged that in and by said ordinance it was contemplated that a contract in form and substance as therein set forth should be entered into between the defendant City and the defendant Water Company, to the effect that the defendant City should have the privilege of causing the appraisement *contemplated by Ordinance 44 of the Series of 1890* to be made forthwith and at a date prior to the expiration of the twenty-year period specified in Ordinance 44—

> "and that the defendant city should and did then and there and thereby elect to purchase the said water works system and plant at the appraised price unless it should grant to the

> defendant Water Company, its successors and assigns, a new franchise, differing in its terms from said ordinance No. 44 of the Series of 1890, all as contemplated by and set forth in said ordinance No. 163 of the Series of 1907."

It is further alleged (Record, p. 13) that the contract so called for by this ordinance was actually entered into; that the appraisers were appointed in the manner specified by *section 11 of said Ordinance No. 44 of the Series of 1890*, and proceeded to appraise the water system and plant.

Referring to Ordinance 163 itself, it will be found that these allegations of the bill are amply supported by its text, which appears beginning at page 69 of the record. We italicize certain portions of the quoted clauses.

The title of the bill is in itself significant:

> "A bill for an ordinance authorizing and empowering the City and County of Denver to enter into a contract with The Denver Union Water Company, whereby said company shall agree that the City and County of Denver may purchase the property of said company under an appraisement to be made *in accordance with Section 11, of ordinance No. 44, of the Series of 1890*, before the arrival of the time fixed therefor in said contract, and authorizing the appointment of appraisers by a committee composed of the mayor, the president of the

board of supervisors and the president of the board of aldermen in accordance with the provision for an appraisement of said property *in the manner provided for in said Section 11 of Ordinance No. 44 of the Series of 1890*, and to determine the fair and reasonable value of the water plant of said The Denver Union Water Company, and the corporations and persons used by said The Denver Union Water Company in supplying water to the City and County of Denver, and to the inhabitants of the said City and County of Denver, and prescribing the manner of executing and carrying out such contract."

The ordinance proceeds to recite Ordinance No. 44 of the Series of 1890, and particularly section 11 thereof; and that The Denver Union Water Company has become the owner of the properties and franchises of The Denver Water Company, and is its successor under Ordinance 44 of the Series of 1890. It is then recited (Record, p. 70):

"And, Whereas, it has been deemed desirable that efforts should be made by and on behalf of the City and County of Denver to purchase the water plant and property owned and used by The Denver Union Water Company in supplying water to the City and County of Denver and the inhabitants thereof, *in accordance with the terms and provisions of the said contract of April 10, 1890*, and upon a valuation thereof fixed by disin-

terested appraisers selected *in accordance with the terms of said contract;* and,

Whereas, the Mayor of the City and County of Denver, at the request of the members of the Council of the City and County of Denver, entered upon negotiations with The Denver Union Water Company for the purpose of ascertaining whether or not said appraisement might be made and said purchase effected *before the time fixed in and by the terms of said contract*—the said The Denver Union Water Company waiving the right to insist that said purchase could not be made under the terms of said contract until after the expiration of the period fixed therefor in the paragraph thereof, hereinbefore quoted; * * * "

The ordinance (Record, p. 71) recites that the Water Company has an abundance of water for the present and future needs of the City, but that additions must be made to its conduits and pipes, and that, in view of the shortness of time which will lapse before *"the appraisers ARE to be appointed under and in accordance with the terms of the contract of April 10, 1890,"* the Water Company is unwilling to expend the large sums of money required for such extensions and additions, in view of the existing uncertainty as to whether the City will exercise its right and option to purchase; and that it is apparent that a delay in the appointment of appraisers for more than two and a half years would be detrimental to the City and County of Denver; and that it is important

to such City and its inhabitants that there should be a speedy appraisement *"under said contract"* and a determination of whether the City will purchase the property owned and used by said The Denver Union Water Company in supplying water to the City and County of Denver and the inhabitants thereof; and that the said City has obtained from the Water Company its consent to waive the

> "period of time fixed and set forth in section 11 of said contract and ordinance, and to agree to proceed in conjunction with the City and County of Denver in accordance with the terms of said contract to the appointment of said appraisers at the present time, and to permit the City and County of Denver to purchase said property upon an appraisement and in accordance with the terms and conditions of said contract and ordinance without awaiting the expiration of the period fixed therefor in and by the terms of said contract and ordinance."

It is then recited that the City has required that the Water Company will submit to the City Council of the City, and through it to the electors thereof, a proposition for a new contract specifying and setting forth the rates for water furnished to private consumers to be charged during the additional period, and also the rates and terms for the supply of water to the City and County of Denver for its municipal purposes, "said rates to be ascertained and fixed for said submission by the arbitrators selected to appraise the property of said company as hereinafter set

forth," so that both propositions—namely: shall the City and County of Denver purchase the water plant of the Water Company and its "allied and auxiliary corporations, persons or associates," at a price to be ascertained and fixed by the appraisers *"to be appointed in the manner provided for and with the qualifications set forth in said section 11 of said ordinance" [No. 44]; or shall the people of Denver* make a new contract for twenty years with the Water Company for water to be furnished to the City and its inhabitants—shall be submitted at one and the same election to the electors qualified to vote thereon.

After reciting that an arrangement has been made with respect to rents to be paid by private consumers during the remainder of the life of Ordinance 44 of 1890, and also that it is advantageous to the City "to proceed forthwith * * * to the appointment of appraisers as provided in section 11 of said contract of April 10, 1890, and to accept the proposition of said The Denver Union Water Company to waive the time limit therein specified", the agreement contained in said ordinance provides (Record, p. 73):

(1) For the appointment of five appraisers or arbitrators, none of whom shall be residents of the City and County of Denver, two to be appointed by each of the parties, and the fifth by the four so chosen.

(2) That the appraisers or arbitrators shall first take an oath respecting the performance of their duties.

(3) That the agreement of any three of them shall be binding and conclusive.

(4) That such appraisers or arbitrators shall view the property, hear evidence, make inquiries, etc.,

for the purpose of ascertaining the value of the premises and property belonging to or used by The Denver Union Water Company, or any of its allied and auxiliary corporations or associations, or persons connected with it or engaged in or assisting in the business of supplying the City and County of Denver and its inhabitants with water; and, after hearing arguments, shall determine and fix the fair cash value of

> "the property, business and rights so owned or used by The Denver Union Water Company, party of the second part, its allied and auxiliary corporations and associations and persons connected with it aforesaid, by which said company at the present time supplies water to the said City and County of Denver, party of the first part, and its inhabitants, or to anyone else at any place whatever, for domestic, manufacturing, or irrigating purposes and which shall constitute and include all the property, rights and privileges of every kind and nature whatsoever acquired by said party of the second part from its predecessor, The Denver Water Company, or from any person or corporation whatsoever, whether the legal title be held by said The Denver Union Water Company or by some other person; and also all property, real or personal, easements, rights and privileges and contracts of every and all nature and kind whatsoever acquired by said party of the second part, its allied and auxiliary corporations or associations or persons connected with it, since their respective incorporations, which

are in any way connected with or relate to said water plant of said The Denver Union Water Company, or held by its allied or auxiliary corporations or associations or persons connected with it, or necessary or useful for its protection, maintenance and operation; and also separately ascertain the fair cash value of all that portion of said pipes, pumps, hydrants, mains and valves now used by The Denver Union Water Company, party of the second part, its allied and auxiliary corporations or associations and persons connected with it, owned by the City and County of Denver, party of the first part."

(5) That the appraisers should proceed with all convenient speed to the hearing and determination of such matters, and make a full report in writing, signed by them or by a majority thereof, such report to be submitted to each of the parties. Thereafter, and as soon as may be, there shall be submitted to the electors of the City and County of Denver the question whether the city shall purchase of "The Denver Union Water Company, its allied and auxiliary corporations and associations and persons connected with it, their successors or assigns, the property referred to and described in section 4 hereof, at and for the price fixed by said board of appraisers or arbitrators, proceeding as aforesaid;" and also at the same time, to the electors qualified to vote thereon, the question as to whether a contract or franchise shall be granted to the Water Company upon the schedule terms and conditions therein specified, and with rates "to be ascer-

tained and fixed by said arbitrators herein provided for, and which shall be fair, just and reasonable rates for the water supplied and services performed, and give to said company fair, just and reasonable returns upon a fair and reasonable valuation of its property and to cover a period of twenty (20) years from and after the date of said election."

(6) That if the electors qualified to vote thereon should refuse to accept the proposition for a new contract, with rates therein specified, but should accept the proposition with reference to the purchase of the plant and property at the appraised value, then the Water Company covenanted that upon the payment of the appraised price, either in money or bonds of the City, it would convey all of said property to the city, and that—

> "after said transfer and the payment and delivery thereof to The Denver Union Water Company of said price therefor in cash or in said bonds of the City and County of Denver, as herein provided, all franchises, rights and privileges which have at any time heretofore been granted to the said The Denver Union Water Company or its successors and assigns by the City and County of Denver, or any of its component municipalities, or which have been transferred to said The Denver Union Water Company, or to any of its successors and assigns, and its allied and auxiliary corporations or associations, and which it shall then possess, shall then be at an end without further action or determination of the same."

(7) That if the electors qualified to vote thereon should refuse to accept the proposition to purchase said water plant, but should vote to grant a new contract, then the Water Company should receive from the City and County of Denver a franchise or contract containing the terms provided for therein, for a period of twenty years from the date of said election.

(8) That if at such election the electors should refuse to accept either proposition—

> "the action of the said parties hereto in entering into this agreement and in submitting said matters to the vote of the electors qualified to vote thereon as herein provided, shall not constitute a waiver of the rights or privileges of either party hereto or prejudice in any manner or form or to any extent whatever the rights and privileges of the City and County of Denver, party of the first part, or The Denver Union Water Company, party of the second part, under and by virtue of the provisions, or any of them, *of the said contract of April 10, 1890, being said ordinance No. 44 of the Series of 1890*, all the rights, privileges and franchises of either party hereunto provided for, or contained in and by the terms of said contract and ordinance shall be and remain in full force and effect the same as if this contract and agreement had not been entered into and none of the proceedings herein provided for had been taken."

Then follow certain immaterial provisions.

Conclusions to be drawn from the provisions of Ordinance 163 respecting the appraisement of the property. Such appraisement was under and in accordance with section 11 of Ordinance 44 of 1890.

After having set forth the terms of this Ordinance 163, the proposition just announced is demonstrated without extended argument. By the express terms of Ordinance 163, the appraisers were appointed and the appraisement was made under and in exact accordance with section 11 of Ordinance 44 of 1890, which was specifically referred to as the authority therefor. Now, in view of the fact that the appraisers did not perform a part of their duty—namely, the fixing of rates to be incorporated in a new franchise, to be submitted to a vote of the people—and in view of the further fact that neither the proposition to purchase nor to grant a new franchise has ever been submitted to a vote of the electors, as provided by Ordinance 163 of 1907, what is the effect of the appraisement made under the direct authority of section 11 of Ordinance 44? We submit that there can be but one answer, and that is, that even if Ordinance 44 does not in itself constitute a binding contract of purchase, then, in view of the failure of the City to grant an extension of the contract on or before April 10, 1910, the one missing element has been supplied by the appraisement made under the authority of Ordinance 44. In other words, while section 11 of Ordinance 44 restricted the right of the City to elect to purchase, after the expiration of the twenty-year period covered thereby, Ordinance 163 of 1907, and the contract made thereunder, waived this provision and permitted the City to make the appraisement un-

der section 11 of Ordinance 44 prior to the time when the same could otherwise have occurred. But Ordinance 44 also provided that the appraisement should not be made until the City elected to purchase. When, therefore, the City and the Water Company agreed, in 1907, to the appraisement, the effect must necessarily have been that the City thereby elected to purchase the property; for there could be no such appraisement unless the City had so elected. It is true that Ordinance 163 provided for the submission of a new franchise to a vote of the people, but such course was never taken. The appraisement, however, remained, not as an appraisement under Ordinance 163, but as the appraisement made under the prior Ordinance of 1890, and such appraisement necessarily implied an election by the City to purchase the property, particularly when the alternative propositions mentioned in Ordinance 163 were never submitted to an electoral vote.

In this connection, it must be borne in mind that at the time the City Council passed Ordinance 163 of 1907 there was no charter provision of Denver to the effect that the City might not elect to purchase this water plant without submitting the question to a vote of the electors. So that, when Ordinance 163 was passed, the body which passed it—namely, the City Council of Denver—had full and complete authority to elect to purchase the plant under Ordinance 44 of 1890, to provide for the appraisement thereof, and to bind the City by such action.

There is nothing in Ordinance 163 indicating that it was intended to abrogate Ordinance 44 of 1890. On the contrary, every provision of the later ordinance

confirms and approves, and is based upon, the right of purchase granted to the City, and the obligations imposed upon both parties with respect to such purchase, by section 11 of Ordinance 44.

In this connection, we again call attention to the language of section 8 of Ordinance 163 of 1907, fixing the status of the parties in event that the electors should reject both propositions to be submitted to them, and in terms providing that under those circumstances

> "the action of the said parties hereto in entering into this agreement and in submitting said matters to the vote of the electors qualified to vote thereon as herein provided, shall not constitute a waiver of the rights or privileges of either party hereto or prejudice in any manner or from or to any extent whatever the rights and privileges of the City and County of Denver, party of the first part, or The Denver Union Water Company, party of the second part, under and by virtue of the provisions, or any of them, of the said contract of April 10, 1890, being said Ordinance No. 44 of the Series of 1890, *all the rights, privileges and franchises of either party hereunto provided for or contained in and by the terms of said contract and ordinance shall be and remain in full force and effect the same as if this contract and agreement had not been entered into and none of the proceedings herein provided for had been taken.*"

Here was an express recognition of the continued effect and operation of Ordinance 44. It will be observed that this provision does not state that, in event of such rejection of the dual and alternative propositions by the electors, the act of the City in making the appraisement under Ordinance 44 shall be of no effect and void; on the contrary, it is said that "*all the rights, privileges and franchises of either party hereunto provided for or contained in and by the terms of said contract and ordinance* [*namely: Ordinance 44 of 1890*] *shall be and remain in full force and effect* the same as if this contract and agreement had not been entered into and none of the proceedings herein provided for had been taken." But the appraisement was not a proceeding provided for by Ordinance 163, but was, as Ordinance 163 expressly says, authorized by and made in pursuance of Ordinance 44 of 1890. If it had been the intention of the parties that the rejection of these propositions by the electors should nullify the appraisement, it would have been extremely simple for the ordinance and agreement to have so provided. The appraisement made under the authority of Ordinance 44 operated as merely a step in the execution of that ordinance, all rights under which were preserved by Ordinance 163 of 1907.

We, therefore, contend that by reason of the appraisement so made, which carried with it by necessary implication an election to purchase, the City became bound under Ordinance 44 to purchase the plant of the Water Company and its subsidiaries, all as fully defined in Ordinance 163, at the appraised value, and that any law impairing the obligation of this contract must necessarily fall as an unconstitu-

tional invasion of the contract rights. The respects in which the subsequent law (Charter Amendment 264a and its subsidiary Ordinance 98 of 1910) impaired these obligations will be the subject for subsequent discussion, as will also be the point raised by petitioners that the property appraised and described in the bill herein was not the same property which the City had the right to purchase under Ordinance 44 of 1890.

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(3) Further assuming, arguendo, that the City is not bound to purchase by reason of either Ordinance 44 of 1890 or Ordinance 163 of 1907, and the proceedings thereunder, it is still obligated to submit to the qualified electors of Denver the proposition of purchasing at the appraised value of $14,400,000.

Ordinance 163 of 1907 provided that after the appraisement was made there should be submitted to the qualified electors of the City the questions, first, of purchasing the property at the appraised value, and, secondly, as an alternative, the question of granting a new contract and franchise to the Water Company, wherein the rates named should be as determined by the appraisers (Record, p. 75).

This obligation upon the part of the City to submit to the electors at a special election these alternative propositions has never been fulfilled. The City avers, as an excuse, merely that the appraisers did not perform one of the duties assigned them; namely, the fixing of rates which should be inserted in the contract or franchise to be submitted to vote. An affidavit introduced in behalf of the present petition-

ers incorporates a letter from one only of the appraisers, in which he says that they encountered the difficulty of fixing a schedule of rates which would give a fair return to the Company throughout the entire period of the franchise, and, confronting this obstacle, "our only course was to decline an impossible task" (Record, p. 259). The appraiser making this statement was one appointed by the City, and the question naturally arises whether any court upon an application for an injunction would be controlled by an *ex parte* statement made by one of five appraisers, which, if true, might excuse further performance. It is true that the appraisers did not prescribe a schedule of rates. Nevertheless, unless the appraisement stands as in fulfillment of Ordinance 44 of 1890, regardless of Ordinance 163 of 1907 (the proposition we have just urged), certainly the City is under an obligation to submit these questions to the people; and if the original appraisers failed to perform their full duties, then the parties were under obligation to select appraisers who would determine the question of rates, or a court of equity might interpose its assistance to that end, so that both propositions might be submitted to a vote and the contract made under Ordinance 163 fulfilled in exact accordance with its terms.

Furthermore, if by reason of impossibility of agreement the appraisers were not able to prescribe rates, and therefore one of the alternative propositions could not be submitted to a vote, it would seem to be entirely reasonable and requisite that the contract be fulfilled so far as possible, and that the City should present to the qualified electors the question of purchasing the property at the appraised value. Certainly no harm could come to the City from so

doing, however much the Water Company would be prejudiced by the fact that the other proposition was not likewise submitted.

Ordinance 163, at the very least, requires that it shall be fully executed, or executed as completely as possible, before the City takes action which would not only impair but totally destroy any value thereof to the defendant Water Company.

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(4) If no obligation to purchase was created or existed prior to the adoption of the charter amendment 264A, that portion thereof providing for the payment of $7,000,000 in bonds for the water plant constituted in itself an election to purchase and an offer of that amount, under the terms of section 11 of Ordinance 44 of 1890; and thereupon there arose either an obligation to purchase at the appraised price or a failure to agree upon the purchase price which became subject to settlement by appraisement or arbitration, as specified in section 11.

The language of section 11 of Ordinance 44 of 1890, respecting the purchase of the property of the Water Company by the City, is as follows (Record, p. 36):

> "At the expiration of the period of twenty years from and after the date of the passage and approval of the ordinance, in case the city shall then elect so to do, the said works may be purchased by the said city, *and in case the parties can not agree, after such election, upon the price to be paid*

> *by the city* for the water works of the said company, its successors and assigns, then their fair cash value shall be determined by arbitration, * * *"

We now proceed on the assumption, *arguendo*, that the appraisement subsequently made did not in itself complete the contract of purchase, and that before the City should be bound by such appraisement, there must be some express election on its part to purchase the water plant.

On this theory we find that at the time of the election of May 17, 1910, at which charter amendment 264A was adopted, the City had the right to purchase the water plant in the manner provided by Ordinance 44 of 1890, and that an appraisement had been made which immediately upon the formal election to purchase would become obligatory upon the City.

This amendment 264A provided, *inter alia*, as follows (Record, pp. 79, 80):

> "*Except as in this section provided*, the city and county shall never purchase or acquire or exercise any right, privilege or power of purchasing or acquiring any water plant or system * * * except upon a vote of the qualified electors * * *.
>
> If The Denver Union Water Company shall place in escrow with the Continental Trust Company of Denver, on or before July 1, 1910, a good and sufficient deed of conveyance from said water company to the City and County of Denver for all the property

> of every description included and embraced in the appraisement made under Ordinance 163, series of 1907, free and clear of all liens, encumbrances, claims and demands of every kind and character, accompanied by a valid surrender and release of any and all rights, claims and demands said company or any of its subsidiary, associated or affiliated companies may have against the city and county or against any of said property, with direction in writing to deliver the same to said commission in exchange for seven million dollars of said bonds at par, then the commission shall file its acceptance with said trust company *and the same shall constitute a binding contract of purchase.*"

This language must be construed in connection with the contractual obligations of Denver at the time the amendment was proposed, voted upon, and adopted by the people. These were (assuming that the absolute obligation to purchase did not exist) that, having the right to purchase the plant of the defendant Water Company, it might elect to purchase, and if its offer was refused, and thereby, in the language of section 11 of Ordinance 44, "the parties cannot agree, after such election, upon the price to be paid by the City for the water works of the said Company, its successors and assigns," then that the value should be determined by arbitration, which should be binding upon the parties. Section 264A evinces an unquestioned desire and election upon the part of the City to purchase the water plant of the defendant Company, as that plant was fully described in Ordinance 163, Series of 1907.

If this be true, no further appraisement was necessary, because that had already been made in strict accordance with section 11 of Ordinance 44 by appraisers having all of the qualifications prescribed therein. Particularly is this true when we keep in mind that charter amendment 264A expressly referred to the property so appraised as the property which it elected to purchase, and for which it offered to pay seven million dollars of its bonds. No further appraisement was necessary, when the one step—namely, the election to purchase—had been taken by the adoption of charter amendment 264A.

But petitioners have heretofore contended in their brief that section 264A cannot have this effect, because it was adopted at a general election, and all electors voted thereon, regardless of their taxpaying qualifications. It is insisted, without reference to any supporting law, that this election to purchase could only be made at a special election, and that only qualified *taxpaying* electors could vote thereon. This argument is refuted by the terms of section 264A itself, which provides that if the Water Company place its deed in escrow for delivery upon the payment of $7,000,000 in bonds, the commission shall file its acceptance, and *"the same shall constitute a binding contract of purchase."* If we were contending that this vote on the charter amendment in May, 1910, and the vote on the question of electing to purchase embodied therein, were both under Ordinance 163 of 1907, there might be some basis for the argument, as provision is therein made for a special election by taxpayers. But such is not the fact. If the charter amendment constitutes an election, as we now claim, it is an election made in pursuance of section 11 of

Ordinance 44 of 1890, and regardless of Ordinance 163 of 1907. Prior to the passage of the charter amendment 264A there was in existence no law of any character requiring the submission to a vote of electors, either taxpayers or otherwise, of a proposition to purchase or acquire a water plant for municipal purposes, although the charter required any bond issue therefor to be approved by a vote of the taxpaying electors. Even if the charter had contained such a provision, it would have been modified by the adoption of 264A, which itself was an amendment to that very instrument.

But even if our argument proceeds too far (which we do not for a moment concede), then section 264A constitutes an election to purchase, and an offer of seven million dollars, which, when rejected, brought into operation the provisions of section 11 of Ordinance 44 providing for an arbitration, because, under the express terms of that section, in event of a failure of the parties to agree on the price to be paid, that shall be determined

> "by arbitration, by five disinterested persons, none of whom shall be residents of Denver, two of them to be chosen by the city, two by the company, and the fifth by the four first chosen, and in case of failure on the part of the company to name arbitrators for the period of thirty days after the city shall have named arbitrators and notified the company so to do, the city may apply to any court having equity jurisdiction in the county in which the city of Denver shall then be situated for the appointment of two persons of the quali-

fications aforesaid as such arbitrators, and the court may thereupon appoint two such persons, who shall act with the same force and effect as if appointed by the company, and the decision of a majority of said board shall be final and binding upon both parties."

The City having failed to appoint its appraisers, and section 11 being silent as to how the City's appraisers may be appointed in event of its default, then a court of equity would have the right to enforce the contract and to determine the purchase price through a reference to its master or appraisers of its selection, and this relief is prayed for in the bill in event that the court shall hold that the price to be paid has not already been determined (Record, p. 29).

That this course is proper cannot be questioned since the decision of the Court of Appeals for the Eighth Circuit in the case of Castle Creek Water Co. vs. City of Aspen, 146 Fed., 8, and already alluded to upon another subject. In that case a precisely similar question was involved. The city of Aspen (Colorado) had elected to purchase the plant of the Castle Creek Water Company, in accordance with the terms of an existing contract, but it refused to proceed to arbitration as to purchase price, which the contract prescribed. Without reviewing the decision at length, it is sufficient to say that the court held that the refusal of one party to appoint appraisers did not defeat the rights of the other, but that a court of equity would specifically enforce the contract, and to that end would determine the contract price to be paid, through its master or appraisers. That case is so directly in point, and is so prolific in the citation of authorities support-

ing it, that it is only necessary for us to refer to it as conclusive upon our right to relief through the court, in event that our prior proposition to the effect that the purchase price has already been fixed, does not commend itself to this court's judgment.

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(5) The obligation of the City to purchase is at the appraised value of $14,400,000, plus expenditures since that valuation was fixed; if not, then at a value to be determined by the Circuit Court, through a master or other appropriate instrumentality.

No useful purpose would be subserved by again pointing out wherein the appraisement made in strict accordance with and in pursuance of section 11 of the ordinance of 1890, although under the immediate authority of Ordinance 163 of 1907, controls in event that the City has elected to purchase. That subject was necessarily connected with and discussed in the previous consideration of the obligation to purchase. Subsequent to the date of the appraisement, and prior to the filing of the bill, the Water Company had expended $694,343.95 for additions, enlargements and betterments (Record, pp. 16, 17), and large additional amounts have been likewise disbursed since the suit was commenced.

If, however, the appraised valuation of $14,400,000 so made, together with the amount subsequently expended, is not to be deemed as the purchase price to be paid in satisfaction of the obligation to purchase, then, inasmuch as the City has refused to appoint its appraisers or arbitrators under section 11, the Circuit Court has the power to fix, and should

perform the duty of fixing, the purchase price through its master or appraiser. The leading authority supporting such power and duty is Castle Creek Water Co. vs. City of Aspen, 76 C. C. A., 516; 146 Fed., 8, wherein, under identical circumstances, the Circuit Court of Appeals for the Eighth Circuit, in an exhaustive opinion, held that a contract by a Colorado city for the purchase of a waterworks system should be specifically enforced, and as the city had refused to proceed with the arbitration and to designate its representative upon the board, the court should fix such purchase price itself. In that case, present counsel for the defendant City appeared for the Castle Creek Company and successfully contended for the exercise of this power.

See also:

Cherryvale Water Co. vs. Cherryvale, 65 Kan., 219.

Town of Bristol vs. Bristol & Warren Water Works, 19 R. I., 413.

III.

THE IMPAIRMENT OF THE CONTRACT.

What constitutes the impairment of a contract?

Before proceeding to an analysis of the impairing laws, we make certain excerpts from decisions of this court determining the scope of the constitutional provision relied on and discussing what constitutes the impairment of a contract.

"The objection to a law, on the ground of its impairing the obligation of a contract, can never depend upon the extent of the change which the law effects in it. Any deviation from its terms, by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, however minute, or apparently immaterial, in their effect upon the contract of the parties, impairs its obligation."

Green vs. Biddle, 8 Wheat., 1, 83.

"But it is manifest that the obligation of the contract, and the rights of a party under it, may, in effect, be destroyed by denying a remedy altogether; or may be seriously impaired by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing."

Bronson vs. Kinzie, 1 How., 311, 317.

"* * * The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other. There can be no other standard by which to ascertain the extent of either, than that which the

terms of the contract indicate, according to their settled legal meaning; when it becomes consummated, the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies then in force. If any subsequent law affect to diminish the duty, or to impair the right, it necessarily bears on the obligation of the contract in favor of one party, to the injury of the other; hence, any law, which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution."

McCracken vs. Hayward, 2 How., 608, 612.

"One of the tests that a contract has been impaired is, that its value has by legislation been diminished. It is not, by the constitution, to be impaired at all. This is not a question of degree or manner or cause, but of encroaching in any respect on its obligation, dispensing with any part of its force."

Planters Bank vs. Sharp, 6 How., 301, 327.

"It is also settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they

were expressly referred to or incorporated in its terms. * * *

* * * Nothing can be more material to the obligation than the means of enforcement. Without the remedy the contract may, indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfillment wholly upon the will of the individual. The ideas of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the Constitution against invasion. The obligation of a contract 'is the law which binds the parties to perform their agreement.' The prohibition has no reference to the degree of impairment. The largest and least are alike forbidden."

Von Hoffman vs. Quincy, 4 Wall., 535, 550, 552.

See also:

Farrington vs. Tennessee, 95 U. S., 679, 683.

"A law which alters the terms of a contract by imposing new conditions, or dispensing with those expressed, is a law which impairs its obligation, for * * * such a law relieves the parties from the moral duty of performing the original stipulations of the

contract, and it prevents their legal enforcement."

Railroad Co. vs. Pennsylvania, 15 Wall., 300, 320.

Murray vs. Charleston, 96 U. S., 432, 448.

"The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced,—by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation. If it tend to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened."

Louisiana vs. New Orleans, 102 U. S., 203, 206.

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(1) The contract to purchase and to pay, howsoever arising, is impaired by certain provisions of the charter amendment 264A and Ordinance 98 of 1910 enacted in pursuance thereof.

Having presented our argument that, prior to the adoption of this charter amendment and the succeeding ordinance thereunder, the City had become firmly bound to purchase the water plant of the defendant Water Company, the last-stated proposition assumes that such contract then existed, and we shall now discuss the numerous particulars in which it has been impaired by the charter amendment and Ordinance No. 98.

Reference must now be made to a number of things authorized by this charter amendment (Record, p. 79), and in stating the propositions we shall quote the exact language of such amendment:

(1) The first provision found therein (Record, p. 79) is that—

> "Nothing in the preceding sections or in this charter, except as herein specifically provided, shall apply to the acquisition or operation of a water works or supplying the City and County of Denver and its inhabitants with water for all uses and purposes, but a public utilities commission is hereby created, to consist of three members, to have complete charge and control thereof, and to have and exercise all the powers given to the board of public works in Chapter IX, as to all public utilities."

(2) After providing for the original constitution of the commission and then for succession in office, its powers are specified, among them being the right to (Record, p. 79, fol. 151)—

> "fix and collect all rates and charges for any service under its control, which rates and charges shall be made as low as good service will permit."

(3) "Said commission shall have and exercise all the powers of the city and county granted in the constitution or named in the charter in the matter of constructing, purchasing, condemning and purchasing, ac-

quiring, leasing, adding to, maintaining, conducting and operating a water plant or system for all uses and purposes and everything pertaining or deemed necessary or incidental thereto."

(4) "Except as in this section provided, the city and county *shall never purchase* or acquire or exercise any option, right, privilege or power of purchasing or acquiring any water plant or system from any person, persons or corporation *except upon a vote of the qualified electors first had and obtained authorizing the same*, and wherever in any ordinance or contract the former City of Denver was given the right, or the city and county now has the privilege or power to purchase or acquire any water system or plant or to extend any contract with reference thereto, *the term 'city' used in such ordinance or contract shall be taken and held to mean the qualified electors of the city and county and not otherwise.*"

(5) "Upon a vote of the taxpaying electors authorizing the same, as hereinafter provided, the City and County of Denver shall and it does hereby authorize the creation of an indebtedness in the sum of eight million dollars to provide a municipal water plant or system and everything incidental or necessary thereto for supplying the city and county and its inhabitants with water for all uses and purposes, said indebtedness to be evidenced by its bonds of the par value of eight million dollars, in convenient de-

nominations of not more than one thousand dollars each and bearing four and one-half per centum interest per annum of such date and in such form and maturing at such times as may be prescribed by said commission. The council shall pass such ordinances as said commission may deem necessary respecting the issuance of said bonds or to the full exercise of all the powers given it, in the form recommended by the commission, and without amendment, and the mayor shall sign the same. Said commission shall issue said bonds only from time to time as they are required for actual use or sale, and the mayor shall sign them and the clerk shall sign and attest them under the seal of the city and the auditor shall register them, with the approval of the president of said commission endorsed thereon." (Record, p. 80, fol. 152.)

(6) "If The Denver Union Water Company shall place in escrow with the Continental Trust Company of Denver, on or before July 1, 1910, a good and sufficient deed of conveyance from said water company to the City and County of Denver for all the property of every description included and embraced in the appraisement made under Ordinance 163, series of 1907, free and clear of all liens, encumbrances, claims and demands of every kind and character, accompanied by a valid surrender and release of any and all rights, claims and demands said company or any of its subsidiary, associated or affiliated companies may have against the

city and county or against any of said property, with direction in writing to deliver the same to said commission in exchange for seven million dollars of said bonds at par, then the commission shall file its acceptance with said trust company and the same shall constitute a binding contract of purchase. In that event then at a special election which the council shall call within sixty days after the adoption of this amendment, to be held on the first Tuesday in September, 1910, there shall be submitted to the qualified taxpaying electors the question of issuing the said eight million dollars in bonds, of which seven million dollars at par shall be delivered to said trust company as aforesaid and the other one million dollars of bonds, or so much thereof as may be deemed necessary, shall be sold or used by the commission to improve, repair and add to the water plant so purchased." (Record, p. 80, fol. 153.)

(7) "In case The Denver Union Water Company shall fail or refuse to fully comply with all the foregoing provisions as to the things to be done and performed by it, then at the special election aforesaid, in lieu of the foregoing question, there shall be submitted to the qualified taxpaying electors on the ballot the question of issuing eight million dollars in bonds to be sold or used to construct and put into operation a complete system of water works for supplying said city and county and the inhabitants thereof with water for all uses and purposes. Said ballot

shall have printed on it the words, 'For the issuance of Eight Million Dollars in bonds for the Construction of a new Municipal Water Plant,' and on a separate line the words, 'Against the issuance of Eight Million Dollars in bonds for the Construction of a new Municipal Water Plant,' with a space opposite each such line in which the voter may make his mark indicating his vote. Such bonds, or so much thereof as the commission may deem necessary, shall be sold or used by it *to construct and put into operation a complete system of water works for supplying said city and county and its inhabitants with water for all uses and purposes, and said commission shall forthwith proceed to construct the same.*" (Record, p. 81, fol. 154.)

(8) "The said commission shall, immediately upon its election, in case The Denver Union Water Company has not accepted the seven million dollars in bonds for its plant as aforesaid, proceed to make a careful investigation of the value of said plant for the uses and purposes of the City and County of Denver and its inhabitants, and also proceed to make a careful estimate of the cost of constructing a complete new water system for the City and County of Denver and the inhabitants thereof, and may submit an alternative bond proposition at said special election for the issuance of bonds in such sums as it may deem advisable for the acquisition or construction of a water plant or any part thereof by any of

the ways within its powers herein mentioned, and the same shall be placed on said ballot in such form as said commission may determine, and it may also submit any proposition concerning its powers or trust at any municipal election in like manner. If a majority of the votes cast thereon shall be in favor of any proposition submitted it shall thereby be adopted, and in case alternative propositions are submitted, and each receive a majority, then the one receiving the greater affirmative vote shall be the one adopted. Such adoption shall be a sufficient authorization for the issuance of the bonds thereby provided for and the same, when issued, shall be and constitute an indebtedness of the City and County of Denver for the purposes aforesaid, and the provisions in this section relative to the issue, sale and redemption of bonds shall apply thereto. *Any provisions of the charter in conflict herewith is hereby repealed.*" (Record, p. 81, fol. 155.)

As will be observed, this charter amendment was numbered section 264A, so that when incorporated in the charter it followed Article IX thereof, sections 252 to 264, inclusive, which had reference to the acquisition by the City of public utilities.

Section 258 of the charter provided that—

> "The cost of acquiring any public utility, way or work, shall be paid by bonds of the city to be issued as provided by ordinance * * *."

And a preceding section, 250, further provided:

"Section 250. No loan shall be made, and no bonds shall be issued for any purpose, except in pursuance of an ordinance authorizing the same, which ordinance shall be irrepealable until the indebtedness therein provided for, and the bonds issued in pursuance thereof, shall have been fully paid. No loan shall be created, *nor bonds issued, unless the question of incurring the same and issuing the bonds therefor shall be submitted to the vote of such of the qualified electors of the city and county,* as shall in the year next preceding such election have paid a property tax therein, and a majority of those voting upon the question by ballot shall vote in favor of creating such debt and issuing such bonds.

The city and county shall not become indebted for any purpose or in any manner to an amount, which, including existing indebtedness, shall exceed three per cent of the assessed valuation of the taxable property within the city and county, as shown by the last preceding assessment for city and county purposes; *provided, however,* that in determining the limitation of the city and county's power to incur indebtedness there shall not be included *bonds* issued for the acquisition of water, light or other public utilities, works or ways from which the city and county will derive a revenue."

We have already pointed out under a preceding topic that at the time of the passage of Ordinance 44 of 1890 the City Council had the full power to contract for the purchase of waterworks, which would include the power to enter into the binding contract of purchase originally initiated by that Ordinance 44.

Now, keeping in mind that at the time of the passage of section 264A the City was obligated by contract to purchase this plant, we find that the charter amendment impairs this contract in a number of particulars. It purports to vest all questions respecting the acquisition or operation of a waterworks system in a Public Utilities Commission which it creates, and the members of which, according to the undenied allegations of the bill, are in conspiracy to destroy and diminish the value of the property of the Water Company. It vests in this commission the determination of all questions respecting rates and charges for any service under its control, and provides that it shall have and exercise *all of the powers of the City and County granted in the Constitution or charter respecting the question of constructing, purchasing and acquiring a water plant.* It then provides that the City shall *never purchase* or acquire, or exercise any option to purchase, any water plant (referring, undoubtedly, to the contractual relations with the appellee Water Company), *except upon a vote of the qualified electors first had and obtained.* This provision requiring such assent of the qualified electors was entirely new and was undoubtedly intended to take away the powers previously vested in the City Council or the Board of Public Works. It then provides that wherever in any contract with respect to the purchase or acquisition of a water system,

the term "city" is used, the same *shall be taken and held to mean the qualified electors of the City, and not otherwise.* It then provides that, upon a vote of the taxpaying electors, the City does authorize the creation of an indebtedness of eight million dollars to provide a *municipal water plant,* which indebtedness shall be evidenced by bonds; and then provides that, if the appellee Water Company shall place a deed in escrow with the Continental Trust Company on or before July 1, 1910, conveying all of the property embraced in the appraisement previously made and therein valued at $14,400,000, there shall be paid to it the sum of $7,000,000, and no more. In other words, a direct assault is made upon the previous contract to purchase at over twice the amount offered by the charter—an attack which, in view of the fairness of the appraisement by men of the highest integrity, was undoubtedly made maliciously, with a refinement of cruelty, and for the purpose of discrediting such appraisement, and in an attempt to avoid the obligations of the contract. It then provides that if the Water Company shall fail to comply with such provisions, there shall be submitted to the qualified electors a proposition to issue bonds in the amount of eight million dollars for the *construction* of a *new* municipal water plant. It will be observed that these bonds, or any portion thereof, could not be utilized for the purpose of purchasing the already existing plant of the defendant Water Company. If these bonds are voted, the amendment says that the same shall be used by the commission in the immediate construction of such new system. Apparently realizing that the authorized offer of $7,000,000 for the plant of the Water Company was merely colorable and confisca-

tory in effect, provision is made for the "careful investigation by the commission" of the value of the plant of the Water Company to the City, and the commission is authorized to submit an alternative bond proposition, which it did not do.

Ordinance 98 of the Series of 1910 (Record, p. 82), approved July 6, 1910, and which calls for the election on the question of voting $8,000,000 of bonds for the construction of a new municipal water plant, such election to be held on the first Monday of September, 1910, was passed and approved in pursuance of the provisions of the charter amendment, but it, as well as the amendment, constitutes a law which may impair the obligation of a contract. Can any reasonable man say that such legislation, taken as a whole, does not impair the prior contract to purchase? It must be borne in mind that, while such binding contract of purchase existed, and petitioners to the contrary notwithstanding, the purchase price must, both from a practical as well as a legal standpoint, be derived from the sale of bonds which must first be authorized by the vote of the qualified electors of the City. The Water Company and the Trustee were entitled to have the question of issuing such bonds submitted to a fair vote of the people under the conditions which existed prior to the passage of the charter amendment. Yet, by that amendment and Ordinance 98 of 1910, the electors were called upon to vote on the question of issuing $8,000,000 of bonds for the construction of a new water plant, and at such election such bonds have been authorized. (Supplemental Bill, Record, p. 284.)

After having authorized such bond issue, no portion of which can lawfully be used for the payment

of the purchase price due to the Water Company and this appellee Trustee, it is as certain as any human event can be that the electors of the city would never authorize an additional bond issue for the purpose of paying such purchase price. The charter amendment, and the acts taken in pursuance thereof, as fully insure the defeat of any proposition to issue bonds in order to carry out the prior contract with the Water Company as though the amendment absolutely prohibited the submission of any such question to an electoral vote. In fact, section 264A appears to destroy all power to vote bonds for such acquisition by purchase. And can it be doubted that such a prohibition would impair the obligation of the previous contract?

The answer to that is found in the case of Von Hoffman vs. City of Quincy, 4 Wall., 535, already cited, and wherein it was held that legislation curtailing the powers of a city with respect to raising money for the payment of interest on previously existing bonds was an impairment of the contract created by such instruments.

The argument that the City might purchase one complete system of waterworks, and also construct an entirely separate but equally complete system, is, we submit, most specious. Admitting, merely for the argument, that such technical power existed, no one can have the temerity to suggest that it would ever be exercised, particularly in a city where, on account of the extent of the water requirements, an expenditure of many millions of dollars would be duplicated. Reading this charter amendment as a whole, no one can doubt that the prior contract with the City will not only be impaired, but its value destroyed by the

amendment, Ordinace 98 of 1910, and the proceedings to be taken thereunder. And this in the face of the numerous decisions of this court (above cited) that the constitutional provision is violated by any impairment, however slight, with respect either to the rights fixed by the contract or the remedies, means or ability provided by law for its enforcement.

While this amendment, investing the taxpaying electors of the City with all of the powers of the City respecting the purchase of existing water plants under any contracts providing therefor, speaks in general terms and does not refer specifically to the prior contract with the Water Company, undoubtedly that was the contract against which the shaft was directed.

If, as this court has held, the constitutional prohibition continues operative until the indebtedness created by the contract has been paid, then, *a fortiori*, any legislation seeking to defeat or prohibit the creation of the municipal indebtedness to pay the purchase price is unconstitutional.

Petitioners assert and constantly reiterate in their brief that, assuming that there was a contract to purchase, section 264A was nothing but an attempted repudiation of that obligation, and therefore constituted a mere breach of contract, which would not amount to a constitutional impairment of the contract. Three decisions of this court are cited in support of this contention:

St. Paul Gas Light Co. vs. St. Paul, 181 U. S., 142;

Dawson vs. Columbia etc. Trust Co., 197 U. S., 178;

Shawnee Sewerage etc. Co. vs. Stearns, 220 U. S., 462.

But in the Dawson case, and also in the Shawnee case, there was no law enacted subsequent to the making of the contracts, and necessarily the constitutional provision was not violated. Furthermore, an analysis of those cases, in the light of their facts and of the subsequent decisions of this court, will demonstrate that they are not at all applicable to such a state of affairs as is alleged in the bill in the present case.

In the St. Paul case a contract had been made between the city and the company under which street lamp posts were to be erected and operated by the company for compensation. Afterwards a disagreement arose, and the city passed a resolution purporting to require the lighting company to remove the posts and declaring that no further rental would be paid therefor. It was clearly a case of the mere denial by the city of its obligation to pay rental, and respecting the same this court said that the resolution

> "created no new right or imposed no new duty, substantially antagonistic to the obligations of the contract, but simply expressed the purpose of the city not in the future to pay the interest on the cost of construction of the lamp posts which were ordered to be removed" (p. 149).

In the Dawson case all the matters involved had been litigated through the state courts by the water company, and the trust company was merely attempting to relitigate in the national courts. There was no allegation that the contract was impaired by any law enacted subsequent thereto, and there was no at-

tempt to show the existence of any controversy whatsoever between the water company and the complainant trustee. This court held (p. 182)—

> "that something more than a mere refusal of a municipal corporation to perform its contract is necessary to make a law impairing the obligation of contracts or otherwise to give rise to a suit under the Constitution of the United States."

See also:

> Shawnee Sewerage Co. vs. Stearns, 220 U. S., 462, 471.

But we do not confine ourselves to the assertion that section 264A or Ordinance 98 merely repudiated the contract. We say that the intendment and effect of the numerous provisions therein were to so involve the Water Company's rights and embarrass the means of enforcing the contract as to render it of substantially no value. In support of their argument upon this proposition, the petitioners contend that nothing in the existing charter of Denver required bonds to be authorized by a vote of the people, and they cite the constitutional provision authorizing cities to issue bonds for waterworks without limitation. It is true that there is no limit upon Colorado cities respecting the amounts of bonds issued for the purpose of supplying municipalities with water; but there are, and have been for years, provisions of the charter of Denver which require all public utilities to be paid for with bonds or their proceeds; and further require such bonds to be authorized by a vote of the duly qualified electors before their issue; and which limit

the corporate indebtedness to 3 per cent of the assessed valuation except in the case of *bonds* issued to acquire water and other public utilities. (*Ante*, p. 181-2.) If it be contended that the enactment of section 264A itself repealed these prior restrictions, in so far as a water supply is concerned (which would appear doubtful in view of the broad character of the restrictions), the objection from a practical standpoint would remain. Judicial notice will be taken of the fact that even the largest of our cities rely upon bond issues to provide for such extraordinary expenditures. Under the circumstances attempted to be created by section 264A, it would be practically useless to present to the electors of Denver a proposition to issue bonds to complete this purchase, after they have already voted eight million dollars of bonds for the construction of a municipal plant and such construction has commenced. Yet the amendment purposely attempts to vest all powers of the City in the hands of its electorate, and, if bonds be not voted, then the only practicable method of securing funds is eliminated.

A state law which requires a vote of the taxpaying electors of a reorganized community in favor of assuming a bonded debt previously incurred is offensive to the Constitution.

> Shapleigh vs. San Angelo, 167 U. S., 646, 657.

That the cases cited by petitioners are not in point, and that the opinions therein are to be limited to the facts then under consideration, has been dem-

onstrated by at least two subsequent decisions of this court:

Mercantile Trust Co. vs. Columbus, 203 U. S., 311, 320;

Northern Pac. Ry. Co. vs. Duluth, 208 U. S., 583, 591;

and is also indicated by this court's previous decision in

Vicksburg Water Works Co. vs. Vicksburg, 185 U. S., 65, 82.

The case of Mercantile Trust Co. vs. Columbus, *supra*, is so similar to the suit at bar as to be almost controlling upon the subject. That was a case brought by the trustee under the mortgage of a waterworks company against the city of Columbus, Georgia, and the waterworks company itself, to restrain the city from the construction of waterworks under a law enacted subsequent to the making of the contract. This law, which was a municipal ordinance, provided for the submission to a vote of the people of the question of issuing $250,000 of bonds for the purpose of constructing a system of waterworks, and recited that the water company had failed to supply the city and its inhabitants with sufficient and proper water, and further provided (p. 314)—

> "that in the event of the assent of the voters at the election, and the issuing of the bonds when the same should have been validated, as by law required, thereafter the water works were to be considered a separate and

distinct department of the city government, and a water commission was to be created for the government and control and operation of the water works."

The court, after distinguishing the case of St. Paul Gas Light Co. vs. St. Paul, *supra*, said (p. 322):

"In the case at bar the conditions are entirely different. There was not merely a denial by the city of its obligation under the contract, but the question is whether there were not new and substantial duties in positive opposition to those contained in the contract created and their performance provided for by the ordinances and act. The act of the legislature aided the city by granting it power to itself erect waterworks and to issue bonds in payment of the cost thereof, and the city was proceeding to avail itself of the power thus granted, when its progress was arrested by the filing of the bill in this case and the issuing of a temporary injunction. It would seem as if the case were really within the principle decided in Walla Walla City v. Walla Walla Water Company, 172 U. S., 1; Vicksburg Waterworks Co. v. Vicksburg, 185 U. S., 65, again reported 202 U. S., 453; Davis etc. Co. v. Los Angeles, 189 U. S., 207; Knoxville Water Co. v. Knoxville, 200 U. S., 22."

In Northern Pacific Ry. Co. vs. Duluth, 208 U. S., 583, the facts appeared that the city and the railway

company had in previous years entered into a contract for the construction of a viaduct over a city street and the railroad tracks thereon. This contract provided that the railroad company was to contribute to the expense of the construction to the amount of $50,000, and the city undertook for a period of fifteen years to maintain the bridge over the tracks and perpetually to maintain the approaches. Thereafter the city passed a resolution reciting that repairs of said structure were required, as set forth in certain specifications which were adopted, and demand was made that the railway company proceed to repair the viaduct in accordance therewith, and in event of a refusal by it to do so, then that an action should be brought to compel the railway company to make the repairs. The railway company refusing, the action of mandamus was brought to compel it to comply with the resolution. This court, while ultimately holding that the original contract was not in fact impaired by the subsequent resolution, in view of the continuing police powers of the city, nevertheless held that a federal question was involved. In answer to the contention of the city that there was no such question in the case, the St. Paul and Dawson decisions being cited in support of such assertion, the court called attention to the specific language used by it in deciding those cases, and which we have already quoted, and, distinguishing them from the case then under consideration, said (p. 591):

> "We think the municipal legislation complained of in this case amounts to more than a mere denial of liability or of the binding force of the former contract. The legis-

lation which deprived one of the benefit of a contract or adds new duties or obligations thereto necessarily impairs the obligation of the contract, and when the state court gives effect to the subsequent state or municipal legislation which has the effect to impair contract rights by depriving the parties of their benefit, and make requirements which the contract did not theretofore impose upon them, a case is presented for the jurisdiction of this court. New Orleans Waterworks Co. vs. Louisiana, 185 U. S., 336, 350, 351. And this jurisdiction has been frequently exercised in cases of municipal ordinances having this effect upon prior contract rights. Vicksburg Waterworks Co. vs. Vicksburg, 185 U. S., 65-81; City of Cleveland vs. Ry. Co., 194 U. S., 517."

The case of Vicksburg Waterworks Co. vs. Vicksburg, 185 U. S., 65, is very much in point. In that case it appeared that the city of Vicksburg had granted to the predecessor of the waterworks company a contract and franchise for the supplying of the city and its inhabitants with water for the period of thirty years. The contract contained a provision that at the expiration of each period of ten years the city should have the right to purchase the waterworks system at a price to be fixed by arbitrators or appraisers. In the bill of the waterworks company it contended that its franchise was an exclusive one for the period of thirty years, but the court did not determine that question or predicate its conclusion thereon. Fourteen years after the contract had been

entered into, and while it remained in effect, the legislature of Mississippi passed an act authorizing the city of Vicksburg to issue bonds to the amount of $375,000 to purchase or construct a waterworks system and other public utilities, and the bill alleged in this connection that the act of the legislature

> "authorizes and permits said city to construct and maintain waterworks for said purpose, if unable to buy the waterworks of said Vicksburg Water Company at the arbitrary and inadequate price fixed by the legislative act."

Afterwards, in pretended pursuance of this act, an election was held in the city, at which it was voted to issue bonds in the sum of $150,000 to buy or construct waterworks for said city.

Thereafter the city passed a resolution and ordinance, as follows:

> "Resolved, That the mayor be and is hereby instructed to notify the Vicksburg Waterworks Company that the mayor and aldermen deny any liability upon any contract for the use of the waterworks hydrants; that from and after August, 1900, they will pay reasonable compensation for the use of said hydrants; that the city attorney take such action as shall be necessary to determine the rights of the city in the premises."

In upholding the contention of the water company that a federal question was presented, this court said (p. 81):

"As respects the act of March 9, 1900, it is contended by the complainant that it is unconstitutional for several reasons, chiefly because it places an arbitrary valuation on the property of the complainant, and because it purports to authorize the city to build and operate waterworks of its own in derogation of the contract rights of the complainant.

Whether this act of the legislature of Mississippi is, in its terms, subject to those objections, or whether it may be regarded as merely authorizing the city to proceed in such a manner as not to conflict with existing contract obligations, we need not determine at this stage of the case, because we think that the ordinance of the city of November 7, 1900, whereby the mayor was instructed to notify the waterworks company that the mayor and aldermen deny any liability upon any contract for the use of the waterworks hydrants, and the subsequent action of the city in holding an election to authorize the issue of bonds to buy or construct waterworks of its own, and in refusing to pay the amount due and payable under the terms of the ordinance, *do not present the mere case of a breach of a private contract to be remedied by an action at law, but disclose an intention and attempt, by subsequent legislation of the city, to deprive the complainant of its rights under an existing contract;* and that, therefore, unless the city can point to some inherent want of legal validity in the contract, or to some such disregard by

> the waterworks company of its obligations under the contract as to warrant the city in declaring itself absolved from the contract, the case presented by the bill is within the meaning of the Constitution of the United States and within the jurisdiction of the Circuit Court as presenting a Federal question."

The impairment, if it should be held that the charter amendment itself constituted an election to purchase at the appraised value, or at least an election to purchase and an offer to pay $7,000,000, which, when rejected by the Water Company, constituted a binding contract to purchase, and to submit the question of the price to be paid, to arbitration or appraisement.

Upon this subject we are met with the contention that this respondent cannot claim any benefit or advantage under the charter amendment and at the same time allege its unconstitutionality. But it must be observed that, so far as the Trust Company is concerned, its bill does not necessarily claim that the charter amendment is in all respects and *in toto* void as unconstitutional, but only that it is invalid in the particulars hereinabove specified, and wherein it impairs the obligation of the contract. It was entirely lawful for the City, through a charter amendment, to elect to purchase (if it were not already bound so to do) the property under Ordinance 44 of 1890, and consequently the charter amendment, in so far as it constitutes such an election, is within the powers of the City. Even if there had been no prior complete contract to purchase, then, in so far as the amendment perfected that contract by making the

election, it was constitutional and valid. But, on the other hand, in so far as, after making that election, it proceeds to authorize and direct a course of conduct absolutely impairing the prior contract which it has completed, it is invalid and void. It is unquestionably true that a legislative act may be partially valid and partially invalid, because unconstitutional. It is furthermore true that the court will endeavor to give effect to the constitutional portions, while it disregards and annuls those which are invalid.

> "* * * whenever an act of congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this Court to so declare, and to maintain the act in so far as it is valid."
>
> El Paso & N. E. Railway vs. Gutierrez, 215 U. S., 87, 96.

But even if we could not contend that the charter amendment constitutes an election, and therefore the completion of a binding agreement to purchase, and at the same time contend that the provisions found therein which impair this contract are unconstitutional; in other words, if it be held that the impairment must arise from legislation *subsequent* to the completion of the contract; our answer is that Ordinance 98 of the Series of 1910, passed by the City Council and approved by the mayor subsequent to the adoption of the charter amendment, and which ordinance provides for the holding of a bond election for the purpose of deriving funds for the construction of a new municipal water plant, constitutes in itself such subsequent legislation as impairs the contract which

the valid portions of the charter amendment completed.

In support of this proposition we call attention again to the case of Vicksburg Water Works Co. vs. Vicksburg, 185 U. S., 65, from which we have already made copious extracts. The court will recall that in that case the constitutionality of an act of the legislature of Mississippi, authorizing the city of Vicksburg to issue bonds for the construction of a waterworks system, etc., was attacked, because impairing the obligation of a prior existing contract between the city and the water works company. In addition to that, an ordinance or resolution of the city, subsequently enacted in pursuance of the statute, was also challenged as unconstitutional, for like reasons. This court refused to pass upon the question of the validity of the legislative act, but held that the succeeding ordinance was, according to the allegations of the bill, an impairment of the contract, saying upon this subject (p. 81):

> "Whether this act of the legislature of Mississippi is, in its terms, subject to those objections, or whether it may be regarded as merely authorizing the city to proceed in such a manner as not to conflict with existing contract obligations, we need not determine at this stage of the case, because we think that the ordinance of the City of November 7, 1900, whereby the mayor was instructed to notify the water works company that the mayor and aldermen deny any liability upon any contract for the use of the water works hydrants, and the subsequent

> action of the city in holding an election to authorize the issue of bonds to buy or construct water works of its own, and in refusing to pay the amount due and payable under the terms of the ordinance, do not present the mere case of a breach of a private contract, to be remedied by an action at law, but disclose an intention and attempt by subsequent legislation of the city to deprive the complainant of its rights under an existing contract. * * * "

So we contend that, if the charter amendment perfected the contract to purchase by making the election so to do, then the subsequent legislation, through the instrumentality of Ordinance 98 of 1910, impaired the obligation of that contract.

And this impairment arises by reason of the same facts already presented.

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(2) Even if the contractual obligation of the City were merely to submit the question of purchase under Ordinance 163 of 1907 to the vote of the qualified electorate (see heading II, (3), p. 162, supra), that contract is impaired by the same charter amendment and ordinance.

In discussing the contract impaired, we have assumed, without waiver of the contention that a binding contract to purchase existed, that prior to the adoption of the charter amendment there was merely a contract, arising out of Ordinance 163 of 1907, to

submit the question of purchasing at the appraised value to a vote of the taxpaying electors.

If such a contract exists, it is of course as fully protected from impairment as would be an absolute contract of purchase, and the question then arises in what manner such a contract is impaired by the charter amendment and Ordinance 98 of 1910. Our argument to the effect that those laws impaired the absolute contract of purchase which we claim existed, is fully as applicable to the matter now in hand. A contract to submit the question of a purchase of this water plant to a vote of the taxpaying electors implied that an election should be held under the circumstances then existing, and that the City should not thereafter by legislation take any course which would render the submission of the question of purchase absolutely nugatory. No one would doubt, that after the taxpaying electors of the City have voted, under the authority of the charter amendment and the succeeding ordinance, to issue $8,000,000 of bonds for the construction of a new municipal water plant, they would promptly and unanimously reject any proposition to purchase the plant of the appellee Water Company for $14,400,000, or more, no part of which could be paid out of the $8,000,000 issue already authorized. A mere reading of the charter amendment and the ordinance of 1910 will indicate that not only is the contract to submit the question of purchase at the appraised value (if it exists) diminished in value and efficacy, but that it is totally destroyed by reason of numerous provisions contained in the amendment, and particularly the one we have above suggested with respect to the voting of bonds for the construction of an entirely different system.

Let us fortify this conclusion by stating a suppositious case. Granting for the argument that Ordinance 163 of 1907 had no additional effect than that claimed by the petitioners—namely, a requirement for the submission to vote of the alternative propositions of purchase or a new contract—let us assume that, while the appraisers were engaged in performing their duties, the City should have adopted a charter amendment or ordinance providing for the construction of a new and independent plant. Could it be for one moment doubted that such subsequent law would have impaired the obligation of the preceding contract, even though such contract were nothing more than an agreement to submit the alternative propositions? In that case the later law would have impaired the former contract in that it would have totally destroyed any possibility of the acceptance of either of the alternatives when submitted to a vote of the electorate.

IV.

THE RIGHT OF THE TRUSTEE TO SUE.

For the purpose of constructing an argument against the right of the respondent Trustee to maintain this action, petitioners assume that it is one brought for specific performance of a contract only, and that the injunctive relief is purely ancillary. The bill is not subject to any such construction. It is clearly and specifically averred therein that prior to the adoption of the charter amendment there were existing contracts between the Water Company and

the City which the subsequent legislation has impaired. The bill further avers that this charter amendment was passed and is sought to be enforced by the defendant City for the very purpose of impairing and diminishing, if not destroying, the marketable value of the water system in question and the security represented by the mortgage, and that such is the natural and inevitable effect of the impairing legislation (Record, pp. 15, 18, 24, 26).

It is true that the bill seeks to compel the specific performance of the contract, but it is not confined either by allegation or by prayer to that relief. The Trustee might, had it seen fit, have refrained from demanding the specific performance of the contract, and yet by allegations such as are contained in the present bill have presented a perfect cause of action for an injunction restraining the City from executing the provisions of the unconstitutional law, leaving to succeeding proceedings the question of enforcing the performance of the contract. In point of fact, one of the manifest objects of the bill is the protection of the contract rights of the complainant Trustee from impairment, and in connection therewith, and in order that the whole controversy may be settled, the enforcement of the contract is demanded.

The prayer of the bill itself specifically asks that the defendant City and its officers be restrained in certain particulars (Record, p. 28), and general relief is also prayed for. In this connection it may be observed that in certain respects the specific prayers of the present bill are in alternative form, and this

practice has also been approved by this court and the inferior federal courts.

Stephens vs. McCargo, 9 Wheat., 502, 504.

Jones vs. Mo. Elec. Co., 75 C. C. A., 631; 144 Fed., 765, 779.

Westinghouse Co. vs. K. C. R. Co., 71 C. C. A., 1; 137 Fed., 26, 32.

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(1) The Trustee may sue to protect the trust estate from diminution, destruction and impairment.

While this proposition was disputed by petitioners in former stages of this litigation, they do not contend to the contrary in their present brief. We shall not do more than to cite the numerous decisions of this court and of the other national courts wherein this right of the trustee under a mortgage has been repeatedly recognized in every form of action brought to protect the trust estate from damage, impairment or destruction. In certain of these cases it was even held that the mortgagor was not a necessary party defendant to such an action.

Reagan vs. Farmers Loan & Trust Co., 154 U. S., 362, 367.

Mercantile Trust Co. vs. Columbus, 203 U. S., 311, 320.

Mercantile Trust Co. vs. T. & P. Ry. Co., 51 Fed., 529, 536.

Benson vs. San Diego, 100 Fed., 158, 159.

Guardian Trust Co. vs. White Cliffs etc. Co., 109 Fed., 523, 527.

Old Colony Trust Co. vs. Wichita, 123 Fed., 762, 766; affirmed 66 C. C. A., 19; 132 Fed., 641.

Farmers Loan & Trust Co. vs. Sioux Falls, 131 Fed., 890, 902.

Johnson vs. City of St. Louis, 96 C. C. A., 617; 172 Fed., 31, 40.

Knickerbocker Trust Co. vs. Kalamazoo, 182 Fed., 865, 869.

N. Y. Trust Co. vs. Michigan, 193 Fed., 175, 180.

Jones on Corporate Bonds & Mortgages, secs. 289, 294.

2 Perry on Trusts, sec. 749.

33 Cyc. L. & P., p. 510.

It is only necessary to add that the mortgage to the complainant Trust Company conveyed in the broadest possible language all of the defendant Water Company's privileges, franchises, easements, choses in action, estate, property, real and personal, debts, dues, demands, etc. (Record, p. 52); and also provided for the payment to the complainant Trustee of the purchase of the water plant, should it be sold to the City (Record, p. 61).

(2) This suit was not brought primarily or alone to recover the contents of a chose in action; and the federal statute prohibiting certain suits by assignees is inapplicable.

Erroneously assuming that this action is for specific performance of contract alone, and that any injunctive relief is purely ancillary and incidental thereto, the petitioners contend that the Circuit Court had no jurisdiction thereover, because of the federal statute which provides:

> "Nor shall any circuit or district court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made."
>
> 25 Stat. L., 434.

Our preceding argument has established, we believe, that this is not merely a suit for specific performance, but, on the contrary, is also an action brought to protect the trust estate vested in the Trustee, as security for the bondholders, and to preserve the same against an unlawful and unconstitutional impairment by the City. The prayer for specific performance is ancillary thereto, and for the purpose of having the entire controversy over which the

court has jurisdiction for one purpose, settled in this proceeding.

If this position be sound, then the statute has no application whatsoever.

In Deshler vs. Dodge, 16 How., 621, the suit was brought by an assignee of a chose in action to recover the thing in specie and damages for its wrongful detention; in other words, a suit in replevin. It was objected that the federal court had no jurisdiction because of the provision in the Judiciary Act of 1789, which is in substance the same as the statute above quoted. But the court held, in the following language, that the statute did not prohibit the institution by the assignee of the replevin suit in question, saying (p. 630):

> "It is admitted the assignors in this case could not have maintained the suit in the federal courts. We are of opinion that this clause of the statute has no application to the case of a suit by the assignee of a chose in action to recover possession of the thing in specie or damages for its wrongful caption or detention; and that it applies only to cases in which the suit is brought to recover the contents, or to enforce the contract contained in the instrument assigned."

In two subsequent cases similar rulings were made:

Bushnell vs. Kennedy, 9 Wall., 387.
Amber vs. Eppinger, 137 U. S., 480.

See also:

Buckingham vs. Dake, 50 C. C. A., 492; 112 Fed., 258.

Jewett vs. Bradford etc. Co., 45 Fed., 801.

The suit at bar, being one to protect the trust estate from damage, diminution and destruction, is comparable to an action at law for damages, and the above decisions directly hold that such an action might be brought in the federal courts by the assignee, even though his assignor could not have done so.

Furthermore, as the Circuit Court has jurisdiction of the suit at bar because of a federal question, the statute is entirely inapplicable. That this is true is manifest from the language of the statute itself, which permits the assignee to bring the action providing his assignor could do so.

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(3) The court having jurisdiction of the case because of the federal question, all controversies involved therein may be adjudicated, even though the federal question be not decided, or be decided adversely to the contention of this respondent.

Siler vs. L. & N. R. R. Co., 213 U. S., 175, 191.

Railroad Co. vs. Mississippi, 102 U. S., 135, 141.

Horner vs. U. S., 143 U. S., 570, 576.

Williamson vs. U. S., 207 U. S., 425, 433.

In Ober vs. Gallagher, 93 U. S., 199, wherein was involved the above-quoted statute prohibiting suits in national courts by assignees of choses in action where the assignor could not so sue, an exactly similar situation was presented. The assignee of several promissory notes, all secured by a loan on property in Arkansas, brought a suit in the Circuit Court for Arkansas to recover judgment upon certain of these notes, as well as a judgment based on a judgment on others of the same series of notes, obtained in another jurisdiction, and seeking to have the lien on the property decreed and foreclosed as security for the payment of the entire decree. He was a nonresident of Arkansas and his assignor was a resident of that state. Objection was made by the defendant to the jurisdiction of the court, on account of the statute prohibiting such suits by assignees. It will be observed that a portion of his claim was predicated upon a judgment secured in another state upon certain of the notes, and with respect to this portion of the demand the statute did not apply, as the court held that the notes were merged in the judgment, and the plaintiff did not claim as the assignee of such notes, but as the owner of the judgment.

The court stated the question as follows (p. 205):

> "As Fleming, the payee of the notes secured by the lien, was, when the suit was commenced, a citizen of Tennessee, and consequently incompetent to sue Thompson, also a citizen of that state, in the courts of the United States, it is claimed that Gallagher cannot maintain this suit."

After holding that the suit might be maintained in the federal court on the prior judgment, the court said, with respect to the other notes in suit, and of which the complainant was assignee (p. 206):

> "The court had, therefore, jurisdiction of the suit as originally brought; and this jurisdiction was not defeated by the amendment which introduced the notes, not in judgment, but secured by the lien, into the case. Having obtained rightful jurisdiction of the parties and the subject-matter of the action for one purpose, the court will make its jurisdiction effectual for complete relief. Story's Eq., 64 k. If the amendment had not been made, the court would, in its decree, have taken care to protect the rights of the holders of the outstanding notes; and that is all it is called upon to do by the amendment. Having jurisdiction for one purpose, it may be retained for all within the general scope of the equities to be enforced."

Therefore, assuming that a mere action for specific performance could not be maintained by the assignee in the federal court, we find that because of the character of the case and the other issues involved, over which such court has jurisdiction, it may proceed to a determination of all questions, including the controversy relative to the specific performance of the contract.

(4) The respondent Trust Company as the assignee of the entire contract may sue for its specific performance.

The mortgage to the complainant Trust Company conveyed all of the property of the defendant Water Company, and, among other things, all franchises and contracts of whatsoever character then owned or thereafter acquired by it, which included, of course, Ordinance 44 of 1890 (Record, p. 52).

There can be no question but that the Trustee, being the assignee of the entire contract, has the right to maintain a suit for its specific performance, particularly where such relief is cumulative and necessary in order to fully settle all of the rights of the parties.

That such a mortgagee, as assignee of the entire contract rights, may maintain such a suit is well settled.

Browne vs. London Necropolis etc., 6 Weekly (English) Reporter, 188, 191; 110 Revised Reports, 930.

Butler vs. Rockwell, 14 Colo., 125.

Waterman on Specific Performance, sec. 70, p. 98.

36 Cyc. L. & P., p. 759.

This court has also recognized the right of the assignee of the entire contract to maintain an action for its specific performance, although if the assignment be only partial the right does not exist.

"If the entire contract had been assigned to the brother, so that he had become substi-

tuted in the place of the complainant, the case would have been different. In that event, the brother might have filed the bill, and insisted upon being treated as representing the vendee. The general rule is, that the parties to the contract are the only proper parties to the suit for its performance and, *except in the case of an assignment of the entire contract*, there must be some special circumstances to authorize a departure from the rule."

Willard vs. Tayloe, 8 Wall., 557, 571.

See also:

Lennon vs. Jones, 222 U. S., 51.

Cella vs. Brown, 75 C. C. A., 608; 144 Fed., 742, 755; *certiorari* denied, 202 U. S., 620.

In the very recent decision of the Circuit Court of Appeals for the Eighth Circuit, in Texas Co. vs. Central Fuel & Oil Co., 194 Fed., 1, 8, a suit for specific performance was maintained by a party designated as a beneficiary under the terms of a mortgage given by one of the parties to the contract.

That such right exists is manifest from a short consideration of what might occur if it did not exist. Let us assume that there had been an appraisement of the water plant in question at $8,000,000, which sum would have been sufficient to discharge the mortgage to the complainant Trustee, but would have left no balance for the stockholders. Under such circumstances the Water Company, controlled by its stockholders, either by arrangement with the City or other-

wise, refused to take steps to enforce the contract, inasmuch as the stockholders would receive no benefit therefrom. Under those circumstances, equity would undoubtedly permit the Trustee as the assignee of the entire contract to institute a suit against the City and the Water Company to compel such performance. The situation as disclosed by the pleadings in this case is analogous to the example just given, although the reasons why the Water Company refuses to bring suit to compel the performance are somewhat different, and are without doubt the result of the honest belief of its directors and stockholders that the Company has other and more valuable rights to protect and assert.

But upon this subject it is contended by the petitioners that the Water Company has denied the existence of the contract, and that the Trustee cannot sue for a specific performance of a contract whose existence is denied by the *cestui qui trust*. But this statement of fact is not true, as the pleadings herein show. The difference between the complainant Trustee and the Water Company lies in their respective opinions as to what is the proper course to take at the present time. Without denying the obligation of the City to purchase if it does not grant a new franchise and contract, the Water Company contends that the City is obligated to make such new grant, and, believing that the same would be more beneficial to it than a sale by it of the property at the appraised value, it has refused to institute the action. Under these circumstances, if the complainant Trust Company be right in its view of the contractual obligations, and that there is a binding agreement on the

part of the City to purchase, which the Water Company, for the above reasons, is not now willing to enforce, the trust estate should be protected by an action on the part of the Trustee to enforce a contract which will bring into its hands a sum more than sufficient to pay off the entire bonded indebtedness secured by the mortgage. Otherwise it might be within the power of a mortgagor to completely destroy the security covered by the trust deed, by refusing to take action necessary for its preservation.

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(5) Certain other objections of petitioners (defendants) to the maintenance of the suit, considered, and shown to be baseless.

(a) The bill is not too broad in its scope.

Petitioners assert the converse of the above proposition, because, they allege, the City is not bound under the terms of Ordinance 44 of 1890 to purchase all of the property now owned by the defendant Water Company, either through itself or its subsidiaries.

Undoubtedly, since Ordinance 44 of 1890 was enacted, the water system then owned by The Denver Water Company, and to which the defendant Water Company succeeded, has been vastly increased, with respect to both the distributing system in Denver and the sources and means of supply. This is clearly indicated by the bill. The growth of the City required large extensions and improvements, involving the expenditure of millions of dollars. In order to secure a proper, constant and unfailing supply of water, it was necessary for the Water Company to

organize its subsidiary, the defendant South Platte Company, which holds the legal title to Lake Cheesman, having a capacity of twenty-five billion gallons of water. Other large conduits and improvements have likewise been constructed. A large portion of this system—in fact, all of the storage reservoirs and a very large part of the supply conduits running therefrom—lie outside of the corporate limits of the defendant City. Indeed, it would be impossible to secure any supply of water by confining the effort within such corporate limits. All Colorado cities, including Denver, are dependent upon mountain streams and must go miles beyond their boundaries in order to reach the source of power supply, and are given the power so to do.

In the face of these facts, petitioners assert that all that the defendant City is compelled to purchase is the plant which was owned by The Denver Water Company at the time of the passage of Ordinance 44 of 1890. Indeed, it is intimated that even less is to be purchased; namely, only such portion of the system then owned as lies within the boundaries of the old City of Denver. A reference to the map inserted at page 235 of the record will show the limits of that municipality.

A resort to the terms of Ordinance 44 of 1890, without any extrinsic aid whatsoever, will demonstrate that this contention of petitioners is baseless.

Section 11 itself provides for the purchase and for the determination of "the price to be paid by the city for the water works of the said company, *its successors and assigns*," and after the determination of the price "the said company shall convey to said city

all of its property, real or personal, easements, rights and privileges" (Record, p. 36). Section 8 of the ordinance provides for the setting of hydrants required by "the extension and growth of the city" (Record, p. 35). Section 19 states that "every provision herein contained" shall "as fully bind and inure to the benefit of the successors and assigns of the said The Denver Water Company as to the said company" (Record, p. 38). And section 20 provides that not only all of the mains, pipes, etc., then owned by The Denver Water Company and composing its plant, but also "all such mains, pipes * * * as said The Denver Water Company, *its successors or assigns*, shall hereafter lay down or set in or upon any of the streets * * * shall be and remain the sole property of said The Denver Water Company, its successors and assigns * * * except in case of purchase by said city under the terms of this ordinance * * * " (Record, p. 38). In view of these and numerous other provisions of the ordinance, there can be no doubt whatsoever but that it was the intention of the parties that the entire water system and plant owned by the grantee or is successors or assigns at the time the purchase was made were covered by section 11.

The mere fact that a portion of the system stands in the name of the defendant South Platte Company does not affect the situation, because, as we shall presently show, that corporation is a mere instrumentality of the defendant Water Company. The bill avers without dispute that every part and portion of the property in question is an essential, inseparable and integral portion of one and the same waterworks system or plant (Record, p. 12). It is untrue, as asserted in

petitioners' brief, that there is any duplication of unnecessary lines in Denver. Under the record in this case there is no evidence whatsoever of any such duplication, and if we could resort to extrinsic matters, the value and necessity of every part and portion of the present water system could and would be demonstrated.

But it is asserted that the provision in the mortgage to the complainant Trustee (Record, p. 61), to the effect that "In case the City of Denver shall have a right to purchase the works and property of the first party, situated within its corporate limits, on the tenth day of April, 1910," and in event of such purchase, then that the Trustee shall be entitled to the purchase price. It is asserted that this is a contemporaneous construction to the effect that all that was covered by the contract of Ordinance 44 was the property within the corporate limits. This clause in the mortgage is somewhat inartificially drawn. For instance, it provides that "in case the City of Denver shall have a right to purchase," etc.; whereas there is no dispute between the parties that the City of Denver did have the right to purchase. This language was inserted sixteen years before the purchase would be effected, and naturally it was not drafted with that care which otherwise would have been exercised. But that this clause can have no significance is further indicated by the fact that when Ordinance 44 of 1890 was enacted a considerable portion of the supply system of the grantee therein was located beyond the corporate limits. Section 11 of that ordinance makes no distinction between the property of the grantee either within or without the limits. Under the most strict

construction thereof, all of the system then owned was covered by section 11; and yet petitioners attempt to limit themselves to the property within the corporate limits.

As a matter of fact, the sole object of the petitioners in this respect is so to emasculate the contract as to render it worthless to anyone. They well know that if they acquired merely the distributing mains within either the old City of Denver or the defendant City, they would have veins only, without the heart or the arteries to feed them. As we have already shown, the defendant City, as well as all Colorado cities, had for years prior to 1890 possessed the power of going beyond the corporate limits to secure its water supply. Otherwise the cities themselves could not have existed.

Our contention is that the description of the property as given in Ordinance 163 of 1907, while more specific than is the general description as found in Ordinance 44 of 1890, constitutes nothing more than an itemization of the waterworks and system of the defendant Water Company, and therefore the property covered by section 11.

But it is asserted that the case of City of Denver vs. Denver Union Water Co., 41 Colo., 77, settles the question in favor of petitioners. The case has no such effect. All that it determines with respect to the subject of the extent of territory covered by Ordiannce 44 of 1890 is that, as to those former towns and cities which subsequently were annexed to Denver, and which then had their own contracts with the Water Company, such contracts during their respective lives, and not Ordinance 44 of 1890, governed those municipalities. This is undoubtedly true, and yet does not

militate against our view, that the property to be purchased is the entire system.

Every insistence of the petitioners upon this subject is completely answered by this court's decision in Omaha vs. Omaha Water Co., 218 U. S., 180, and the decision of the Circuit Court of Appeals for the Eighth Circuit, reviewed by this court in the above case, reported in Omaha Water Co. vs. City of Omaha, 89 C. C. A., 205; 162 Fed., 225.

We have examined the printed transcript of record in the Omaha case in this court, and the page references which we now give are to that record. In that case the ordinance of the city of Omaha, passed June 11, 1880, provided, *inter alia*, (p. 686):

> "The City of Omaha shall have the right at any time after the expiration of twenty years to purchase the said water works at an appraised value, which shall be ascertained by the estimate of three engineers, one to be selected by the city council, one by the water works company, and these two to select the third; * * *."

The waterworks constructed by the grantee in this ordinance, or his successors, were constructed and were so extended as not only to supply Omaha but outstanding incorporated cities or towns, and unincorporated communities, and ordinances or contracts were entered into between the water company and these adjacent territories. Under date of October 17, 1887, the city of South Omaha granted to the waterworks company (successor under the Omaha ordinance) the right to construct and operate for seven-

teen years waterworks in South Omaha (pp. 419-421), and again by another ordinance, approved August 25, 1903, extended the last preceding ordinance for ten years—from October 17, 1904, to October 17, 1914 (p. 421).

The city of Florence, by ordinance approved August 13, 1889, granted to the company the right to lay, etc., water mains and pipes without limit of time, and by another ordinance, approved November 14, 1903, the water company contracted for twenty-five years to keep all mains in the city of Florence supplied with water (pp. 423-428).

Under date of August 8, 1890, a contract was entered into between the water company and the East Omaha Land Company respecting the laying, maintaining and operating of water mains, etc., in the lands of the grantor, which became known as East Omaha. This contract provided that, in case of any purchase of the works of the company in the city of Omaha, and the property of the land company should not then be included within the corporate limits of said city, then the land company should have the option to purchase the mains and pipes laid down within its property, and if it did not then choose to purchase the same, the water company might convey the same to the city of Omaha, subject, however, to the provisions of the contract (pp. 428-433).

By resolutions of the village of Dundee, dated September 7, 1889, and December 22, 1900 (pp. 433-434, 485-486), the water company was granted certain rights to lay mains and pipes in the streets of that village.

These contracts were all in effect when the city of Omaha exercised its right of purchasing the works

from the Omaha Water Company. The city contended that it was not required to purchase those portions of the system lying within the outlying municipalities and communities, particularly in view of the fact that the same would be encumbered by the above-mentioned contracts. It was claimed, not only that the city had no power to acquire such works outside of its corporate limits, but also that the original contract of 1880 did not require it to do so.

All of these contentions were overruled, first by the Circuit Court of Appeals in the case above mentioned, and afterwards by this court, which disposed thereof in the following language (218 U. S., 200):

> "We are also satisfied with the conclusion of the Circuit Court of Appeals that the acquisition of the system as it existed at the time the city made its election to purchase was within the contemplation of both the city and the water company, and that the valuation of the system as an entirety was the matter which the appraisers were required to do. What we shall say upon this point will support our conclusion as to the power of the city, for the legislation upon that matter must be read in the light of the subject-matter and of all the known local conditions. The most weighty fact in this connection is, that the system was one single system, having a common source of supply and common main connections therewith. Its dismemberment is not to be thought of unless it is clear that the ordinance exercising the option is so plainly limited to the

purchase of only so much of the distributing system as lay wholly within the corporate limits as to admit of no other meaning. A presumption against dismemberment is not overthrown even if the city had no power to sell water to people or municipalities beyond its limits. If these outside distributing pipes could not be lawfully used by the city for the purpose for which the water company had used them, it does not follow that a contract to buy would be thereby any the less a contract to buy the plant as a unitary system. Aside from contract obligation which may pass with the plant, the city might cut off the supply of water to such outlying environs, if it saw fit, whether it could or could not legally supply water through the distributing pipes which had theretofore reached them. Certain it is that as the several towns adjacent had no source of supply, no pumping station of their own, disintegration would leave the water company with no means of supplying them with water. The distributing pipes under ground would, separated from the ownership of the pumping station, reservoir, filling, or settling basins, necessarily lose much of the value which attached to them as a part of a going plant.

The reservation in the ordinance under which the works were constructed should be read and interpreted in the light of the almost certain extension

> of the plant as the expansion and growth of the city might demand. The city, at the time the ordinance was passed, had some thirty thousand people. When the election to buy the plant was made it had, approximately, four times as many. As is usual in respect of growing cities, there had grown up around it groups of population, which, in some cases, expanded into semi-dependent municipalities. Connected by continuous streets and car lines, they made one large community, and constituted greater Omaha. The water company, as was obviously expected from the beginning, expanded with Omaha and met the public necessities by including these outside populations within its distributing system."

The case of People's Gas Co. vs. Chicago, 194 U. S., 1, cited by petitioners in support of the proposition that the bill in this case is too broad, is not in point. That suit involved an alleged contract establishing rates which it was claimed had been impaired by a later ordinance of Chicago, and the decree in the case was based on the proposition "that a special statutory exemption, such as immunity from taxation, from the right to determine rates of fare, or to control tolls, and the like, does not pass to a new corporation succeeding others by consolidation or purchase, in the absence of express direction to that effect in the statute."

The fact that the legal title to a portion of the property stands in the name of the defendant South Platte Company does not affect the situation.

The bill avers, and it is not denied, that the defendant Water Company caused the South Platte Company to be organized for the purpose of constructing an inseparable and essential portion of the plant; that the Water Company owns all of the stock of the South Platte Company and absolutely controls its affairs, and has a lease upon all of its property for a long period of years (Record, pp. 8, 9).

Under these circumstances there can be no question but that the South Platte Company is a mere agency or instrumentality of the defendant Water Company, and that the court will look beyond its mere corporate form for the purpose of enforcing the contractual obligations of the Water Company.

J. J. McCaskill Co. vs. U. S. 216 U. S., 504, 515.

Union Pacific Ry. Co. vs. C. R. I. & P. Ry. Co., 163 U. S., 564, 567.

Stratton's Independence Limited vs. Dines, 68 C. C. A., 161; 135 Fed., 449.

U. S. vs. Smith, 181 Fed., 545.

Linn &c Co. vs. U. S. (C. C. A., 9th Cir.), 196 Fed., 593.

And in the recent case of Texas Co. vs. Central Fuel Co., 194 Fed., 1, 10, a suit for specific performance, the Circuit Court of Appeals of the Eighth Circuit held, in the following language, that sub-

sidiary companies were not even necessary parties to a proceeding against the controlling company:

> "Neither of these defendants is an indispensable party to this proceeding and the subsidiary companies are not even necessary parties, for the Central Company, as the holder of the majority of their stock, has control of them, and a decree against it will grant all the relief complainant prays. [Citing U. P. Ry. Co. vs. C. R. I. & P. Co., *supra.*] Equity rule 47 expressly provides for cases of this nature."

And the enforcement of the purchase of the Kansas City Water plant, hereinbefore alluded to, involved property held by corporations subsidiary to the main water company.

See:

National Waterworks Co. vs. Kansas City, 78 Fed., 428, 429.

(b) The trustee under the mortgage of the South Platte Company is not a necessary or an indispensable party. In any event, this question cannot be raised or considered in the present state of the record.

On page 9 of the record it appears that the South Platte Company, which is made a defendant, has executed and delivered its mortgage to an unnamed trustee, to secure its issue of $4,000,000 of bonds, dated July 1, 1903, but which, according to the allegations of the bill, were payable at any time beginning April

10, 1910, and ending April 9, 1911. The trustee under this mortgage has not been made a party defendant, and some slight argument is predicated upon this fact. It is a complete answer to this proposition to say that the want of proper parties must be brought to the attention of the Circuit Court by demurrer, plea or answer, pointing out the respects in which the bill is deficient as to parties.

Equity Rule 52.

Greenleaf vs. Queen, 1 Peters, 138, 148.

When the record in this case was made up, such action had not been taken by the defendants, now the petitioners. But even if the matter were properly raised, nevertheless, if it appeared to the court that a necessary or proper party could not be made such by reason of his being out of the jurisdiction of the court, or because his joinder would oust the jurisdiction of the court, it may in its discretion proceed in the cause without making such persons parties.

It is, of course, well settled that the absence of formal or even necessary parties does not defeat the jurisdiction of the court, and that it will proceed with the trial and adjudication of the case as between the parties before it, preserving the rights of others not voluntarily appearing, and so shaping the decree that such rights of absent parties will not be affected.

Equity Rule 47.

Waterman vs. Canal-Louisiana Bank Co., 215 U. S., 33, 48.

California vs. Southern Pacific Co., 157 U. S., 229, 249.

Barney vs. Baltimore City, 6 Wall., 280, 284.

Cameron vs. McRoberts, 3 Wheat., 591, 592.

Elmendorf vs. Taylor, 10 Wheat., 152, 165.

Mechanics' Bank vs. Seton, 1 Peters, 298, 306.

Shields vs. Barrow, 17 How., 129, 139.

It has frequently been held that in a suit for specific performance the court may by its decree make such provision for the payment of encumbrances as will protect the rights of all parties.

Strickland vs. Barber, 76 Mich., 310, 314.

Grant vs. Beronio, 97 Cal., 496.

Hudson vs. Max Meadows Co., 97 Va., 341, 345.

Hunt vs. Smith, 139 Ill., 296, 303.

Guild vs. A. T. & S. F. Co., 57 Kan., 70, 76.

Preble vs. Abrahams, 88 Cal., 245, 252.

Kentucky Distilleries Co. vs. Blanton, 80 C. C. A., 343; 149 Fed., 31, 41; affirming 120 Fed., 318, 340.

McCullough vs. Sutherland, 153 Fed., 418, 423.

Two recent decisions of the Circuit Court of Appeals for the Eighth Circuit, involving the character of decrees to be entered against cities for the performance of their contracts to purchase waterworks, are directly in point:

City of Omaha vs. Omaha Water Co., 192 Fed., 246, 250.

Slocum vs. North Platte, 192 Fed., 252, 263.

In the City of Omaha vs. Omaha Water Co., *supra,* the court said:

> "It is common practice, in cases of large encumbrances like those here in question, where from the nature of things and the necessities of the parties they could not be satisfied without resort to the proceeds of a sale, to accomplish the desired objects by decretal orders making application of the purchase money to satisfy the encumbrances before any part of it is turned over to the owner or mortgagor." (Citing cases.)

And in Slocum vs. City of North Platte, *supra,* the court said:

> "Upon payment by the city of such value, within a reasonable time to be fixed by the Circuit Court upon the return of the cause to that court, the appellant will cause to be satisfied of record all encumbrances placed by him or the water company upon the water works system (unless the city shall agree to assume such encumbrances, or such part thereof as it may agree with the appellant that it will assume and relieve the water company and the appellant from the payment thereof), and turn over to the city said water works system and other property included in the award of the appraisers, and a good and sufficient deed and conveyance of all of such property to the city."

A similar decree could be made in the present case which would amply protect the rights of all par-

ties, and thereby the interests of the absent trustee under the South Platte Company's mortgage would not be injuriously affected.

(c) There was no non-performance of the contract by the Water Company as bars it, or, a fortiori, the Trustee under its mortgage, from maintaining a suit for specific performance.

Petitioners' contentions upon this subject are based solely upon the affidavit of a city employe, E. B. Thrush (Record, p. 261), and the certificate of the clerk of the defendant City (Record, p. 262), purporting to show that certain ordinances requiring the setting of hydrants and the making of extensions at various times between the year 1902 and the year 1909 were not complied with. The bill and cross-bill both aver that the defendant Water Company and its predecessor have at all times fully complied with and observed all of the terms and conditions of Ordinance 44 of 1890 (Record, pp. 12, 123). As against these allegations, not denied by any pleading, *ex parte* affidavits of city employes of the character above indicated, and not in any wise explaining where the extensions were to be made or the hydrants set, or the necessity therefor, and not negativing a presumption that the failure to comply was acquiesced in by the City, would not overcome the allegations of the bill.

We shall not devote much time to this question, because the charge is more one wherein the Water Company is interested, and will doubtless be discussed in its brief.

Suffice it to say that, even though there were some minor failure to comply with Ordinance 44 of

1890, the same could not be asserted as a defense to a suit for specific performance. The City would be relegated to an action at law for damages.

City of St. Charles vs. Stookey, 85 C. C. A., 494; 154 Fed., 772, 776.

Omaha Water Co. vs. Omaha, 85 C. C. A., 54; 156 Fed., 922, 926.

Kauffman vs. Raeder, 47 C. C. A., 278; 108 Fed., 171, 178.

German Sav. Inst. vs. Delavergne Co., 17 C. C. A., 34; 70 Fed., 146, 150.

Any such delinquencies would not be chargeable against the complainant Trustee.

(d) The Water Company is not estopped by reason of its conduct from enforcing its rights. In any event, such conduct does not impair the rights of the complainant Trustee.

As we understand petitioners' contention on this subject, beginning at page 183 of their brief, it is that the defendant Water Company is estopped from asserting its right to a renewal by reason of certain conduct on its part. With that particular question this respondent is not interested, and therefore will not occupy any space in discussing it, except to say that the principal claim made is that the Water Company, by submitting to a vote of the electors of Denver, in May, 1910, a proposition for a new franchise, waived its right to assert the present contentions. It is sufficient to say that section 20 of this proposed franchise (Record, p. 269) expressly provided as follows:

"Neither this franchise or grant, nor any provision herein, nor the proposal thereof, shall be a waiver of any right, claim, grant, license, franchise or right of way belonging to or claimed to belong to The Denver Union Water Company or any of its assignors, predecessors or consolidating companies, nor shall this franchise and grant in any manner be considered as a waiver in any way of any right or contention by either the City and County of Denver or The Denver Union Company, to the prejudice of either party as to the validity, scope, construction or duration of any franchise, grant, easement, license or right of way owned or claimed by the grantee, but the rights of both parties and their positions and contentions in any and all litigation, existing or which may arise concerning ordinances, franchises, grants, licenses and rights of way owned by the grantee, and in respect of any claim or contention, shall remain entirely unaffected by this ordinance or the proposal thereof."

V.

THE BILL STATES A CAUSE OF ACTION.

There is no adequate remedy at law.

It is briefly contended by appellants that the Trustee has an adequate remedy at law; namely, an action to recover the appraised value of the plant.

But a fair consideration of the various issues involved, the present action of the City in the impairment of the contract, the injunctive relief required, the fact that the mortgagor will not institute the suit itself, the situation as to the South Platte Company, the necessity of an accounting to determine adjustments of purchase price, as suggested by the appraisers, and the numerous other questions to be settled, clearly indicate that any remedy at law would not be so complete and adequate as is this suit in equity.

The rule on this subject is so well settled that we shall refer to but few authorities.

> "This court has repeatedly declared in affirmance of the generally accepted proposition that the remedy at law, in order to exclude a concurrent remedy at equity, must be as complete, as practical and as efficient to the ends of justice and its prompt administration, as the remedy in equity."
>
> Walla Walla vs. Walla Walla Water Co., 172 U. S., 1, 12.

In another suit in equity for specific performance, this court has said:

> "In cases of specific performance, to which category the one before us belongs, parties are sometimes remitted to a court of law. But this is never done where the remedy is not as effectual and complete there as the chancellor can make it. Equity sometimes takes jurisdiction on account of the

parties, and sometimes on account of the relief proper to be administered."

May vs. Le Claire, 11 Wall., 217, 236.

In another case the syllabus reads as follows:

"Where a lease of a railroad for ninety-nine years contained covenants for the payment of monthly installments of rent, to keep the road in repair, and to keep accounts of all matters connected with its business, as affecting the amount of rent to be paid, which covenants were guaranteed by other parties than the lessee, a bill which shows failure to pay rent, depreciation of the road, and combination of the guarantors and lessee to divert the earnings of the road to the benefit of the guarantors, presents a case of equitable jurisdiction when it prays for specific performance of the obligations of the lease. In such a case a suit at law on each installment of rent as it falls due is not an adequate remedy."

And the court said (p. 306):

"In short, the numerous questions, the complex issues, raised in the case can only be satisfactorily tried in a court of equity, and that court alone can give full, adequate and complete remedy for the grievances of plaintiffs growing out of the violation of this contract, and adjust the extent and nature of that relief among the parties to it."

Penna. R. Co. vs. St. Louis, etc., Co.,
118 U. S., 290.

The exact question was raised in the Circuit Court of Appeals for the Eighth Circuit in Castle Creek Water Co. vs. City of Aspen, 146 Fed., 8, hereinabove referred to, and which suit was brought to compel the city of Aspen to specifically perform its alleged contract to purchase the waterworks plant of the Castle Creek Company. The court said (p. 14):

> "Finally, counsel object to the maintenance of this suit upon the ground that the complainant has an adequate remedy at law. But the adequate remedy at law which will deprive a court of equity of jurisdiction must be as certain, complete, prompt, and efficient to attain the ends of justice as the remedy in equity. Boyce's Ex'rs vs. Grundy, 3 Pet., 210, 215, 7 L. Ed., 655; Williams vs. Neely, 134 Fed., 1; 67 C. C. A., 171, 180; 69 L. R. A., 232. An action at law for damages for the refusal of the city to appoint appraisers, or an action at law for the price of the works, necessarily involves an accounting of the income and expenses of the property—an accounting which a court of equity with its deliberate methods, its power to select men of training and experience in work of this nature, its authority to consider and to modify their reports after exceptions and hearings, is alone competent to fairly take and justly determine. No remedy at law which necessitates the submission of such questions to a jury is either adequate or as efficient to attain the ends of justice as

this remedy in equity. Gunn vs. Brinkley Car Works, etc., Co., 66 Fed., 382, 384; 13 C. C. A., 529, 531; Fechteler vs. Palm Bros. & Co., 133 Fed., 462, 465; 66 C. C. A., 336; Hayden vs. Thompson, 71 Fed., 60, 63; 17 C. C. A., 592, 595. The water company cannot deliver the waterworks to the city, and bring an action at law for their price because the municipality refuses to accept them. The company cannot tender the works and then abandon them and bring its action at law, because these works supply the city and its citizens with water, and the public interest, the danger of fire, the domestic necessities of the people of the city forbid the cessation of their operation. Barton vs. Barbour, 104 U. S., 126, 134, 26 L. Ed., 672; Joy vs. St. Louis, 138 U. S., 1, 47, 11 Sup. Ct., 243, 34 L. Ed., 843. A court of equity alone possesses powers sufficiently elastic and comprehensive to continue the operation of the works, if the interest of the public demands it, to fairly take the accounting which conditions their productive worth, and to render a decree that the property be conveyed, and that the price be paid at such time and on such terms as will best conserve and enforce the rights of all the parties in interest. It alone has plenary power to enforce this contract, and the water company has no remedy at law as complete and efficient as the remedy in equity. It has no remedy at law that will secure it adequate relief. The demurrer should be overruled, the defendant should be

> permitted to answer, and, unless a defense not yet suggested is presented, the court below should appoint a master to ascertain, under its direction and subject to its approval, the productive worth of the works, and should enforce the performance of the contract of sale. The decree below is accordingly reversed, and the case is remanded to the court below for further proceedings not inconsistent with the views expressed in this opinion."

The decree of the court in that case satisfied the argument of the distinguished solicitors for the Castle Creek Company, now of counsel for petitioners, who said in their brief therein (p. 69):

> "The court then, has jurisdiction of the controversy, and the bill is framed both for general and special relief. *It has jurisdiction to prevent the erection by appellee of a municipal plant in contravention of its contract with and its duty to the appellant, or the erection by its sanction of a rival system by private parties* (though no exclusive franchise was alleged). * * * *It need not, it cannot relegate the appellant to an action at law unsatisfactory, insufficient, elusive and doubtful.*

Generally:

The preceding argument has taken such a wide range that nothing further remains for discussion under this heading. If there be an existing contract,

if that contract has been impaired by legislation of the city, and if it may be protected, by injunction, from destruction, or specifically enforced in this action, it necessarily follows that the cause of action is proven. All of these questions have been the subject of previous consideration in connection with the court's jurisdiction and the right of the complainant to sue, and further argument thereon would be mere repetition. It only remains for us to say that, in our opinion, a complete cause of action is shown (a) to protect the trust estate from impairment and destruction; (b) to enjoin the execution of, and annul, the unconstitutional legislation which impairs the contract rights; and (c), by way of complete relief, to secure specific performance of that contract.

VI.

THE TEMPORARY INJUNCTION WAS NOT GRANTED IMPROVIDENTLY OR CONTRARY TO THE FEDERAL STATUTE (36 STAT., 539, 557).

The question now presented was not raised by petitioners in the Circuit Court, nor was it presented to the Court of Appeals until that court had not only handed down its opinion and entered its decree, but had overruled the petition for rehearing. (See Respondents' Brief opposing granting of the writ of certiorari.) Granting, for argument, that the objection could not be waived, this failure of learned counsel to make any protest at the proper time is cogent proof that their belated contention is without merit. And this is undoubtedly true.

The terms of the statute now invoked apply only to interlocutory injunction applications suspending or restraining the enforcement, operation or execution of:

(a) *"Any statute of a state."*

(b) "By restraining the action of any *officer of such state* in the enforcement or execution of *such statute.*"

The bill presented to the court below in the present case sought neither to restrain the enforcement, operation or execution of any statute of the State of Colorado (within the meaning of this act), nor to restrain the action of any officer of such state in the enforcement or execution of any statute.

1. The bill attacked the constitutionality of certain provisions of charter amendment 264A of the City of Denver, which pertains solely to the municipal water supply. Was such a charter provision, local to Denver upon a subject of purely municipal and not state interest, a "statute of the state" within the meaning of the act? We fully concede that, for the purpose of raising a federal question, this charter amendment was a "law" which might, and in this case did, impair the obligation of contracts. The Supreme Court has frequently announced that a municipal ordinance may be such a law within the contemplation of the constitutional prohibition against the impairment of contracts, and the cases cited by petitioner are of this character. But an entirely different question is raised by section 17. The term "statute of a state" should be given a broad or a restricted meaning according to its context and the

plain intention of Congress. And even if it should be held that the language of section 17 was broad enough to justify the contention of appellants, nevertheless if, upon a consideration of the entire act of which it is a part, it is manifest that Congress did not intend to regulate such a case as this, then a narrower significance must be given to the term employed.

> "It is undoubtedly the duty of the court to ascertain the meaning of the legislature from the words used in the statute, and the subject matter to which it relates; and to restrain its operation within narrower limits than its words import if the court are satisfied that the literal meaning of its language would extend to cases which the legislature never designed to embrace in it."
>
> Brewer vs. Blougher, 14 Pet., 178, 198.
>
> Petri vs. Bank, 142 U. S., 644, 650.
>
> McKee vs. U. S., 164 U. S., 287, 293.

See also:

> Holy Trinity Church vs. U. S., 143, U. S., 457, 459.

In Holy Trinity Church vs. U. S., *supra*, Mr. Justice Brewer said that in arriving at the intention of the lawmakers the title of the act should be considered, and also the evil which it was designed to remedy. In the interest of brevity, however, we shall not quote his lucid language upon these subjects.

Bearing in mind, then, that in the construction of section 17, the title of the act, the context of the sec-

tion, the evil designed to be remedied, and its apparent reason and purpose, must all be considered in order to arrive at the intention of Congress, it is plain that this section does not control such a suit as the one now before the court. The provision (as it stood when this suit was instituted) is found in the Commerce Court Act (36 Stat. at Large, Part I, pp. 539, 557), entitled—

> "An act to create a commerce court, and to amend the act entitled 'An act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, as heretofore amended, and for other purposes."

Prior to the passage of the act there was much criticism (largely the result of political conditions) of injunctions issued by the federal courts restraining the enforcement by *state officers* of *state statutes* relating to commerce. Unquestionably Congress had in mind such suits in enacting this provision. This is indicated by the fact that it was inserted in the statute establishing the Commerce Court and regulating matters of commerce, under a title of the same character. The provision of section 17, that the governor and attorney general of the state must be notified of the application, necessarily supports and requires this conclusion. Can it be conceived that the governor and the attorney general of Colorado should have been notified of the application for an injunction in the present case, which pertained solely to questions affecting the municipal water supply of the City of Denver—a subject over which they had no jurisdiction whatsoever?

The case of Mayor of Rutherford vs. Swink, 96 Tenn., 564, clearly presents the differentiation between a "statute of a state," as used in the ordinary sense, and a municipal ordinance or regulation. The law there under consideration provided that—

> "the repeal of a statute does not affect any right accrued, any duty imposed, any penalty incurred, * * * under and by virtue of the statute repealed."

It was held that the code provision applied only to *statutes of the state*, and not to the repeal of a municipal ordinance, the court saying (p. 567):

> "* * * It is insisted by appellant that a municipal ordinance is a statute, and that the legislature intended that section 47 of the code should apply to the repeal of municipal ordinances, the same as to the repeal of the state statute. An ordinance is defined to be 'a rule or regulation adopted by a municipal corporation.' (And., Law Dict., p. 738.) The terms 'by-laws,' 'ordinances,' and 'municipal regulations' have substantially the same meaning, and are defined to be 'the laws of the corporate district, made by the authorized body, in distinction from the general laws of the state.' They are local regulations, for the government of the inhabitants of the particular place. State vs. Lee, 29 Minn., 451-453, and cases cited.
>
> In the case of Baldwin vs. City of Philadelphia, 99 Pa. St., 170, the court say that an

ordinance of the councils of a municipality, though binding upon the community affected by it, its not a 'law,' in the legal sense. It is not prescribed by the supreme power of the state, from which alone a law can emanate, and it is not of general authority throughout the commonwealth.

'The ordinances of the city are to its charter as the statutes of a state are to the Constitution.' (And., Law Dict., p. 738.)

A statute is defined to be 'the written will of the legislature, expressed in the form necessary to constitute it part of the law; an act of legislation; an enactment; a written law.' It is manifest that a municipal ordinance is not a statute, in the sense in which the word 'statute' is used in said section 47, Mill. & V. Code; that it was only intended to apply to the *statutes of the state;* and that the common-law rule still applies in this state to the repeal of municipal ordinances, the same as it did before section 47 of the code became the law."

As further emphasizing this conclusion is the fact that the term "statute *of a state*" is employed—and not merely the word "statute."

2. But if there were any doubt as to whether charter amendment 264A was a "statute of a state," as that term was used in section 17 of the Commerce Court Act, there can be none that the municipal agents or officers of the City of Denver whose acts, sought to be restrained, pertain solely to the matter of a local water supply, are not "officers of the state,"

as that term is employed therein. It is to be observed that, to bring the suit under the purview of section 17, it must be one not only to enjoin the enforcement of a state statute, but to restrain the action of "officers of the state" thereunder.

That the defendants in the present suit, now appellants, are not such officers is proved by the very authorities which appellants cite in their supplemental petition for rehearing.

People vs. Curley, 5 Colo., 412.

David vs. Portland, 14 Ore., 98.

Attorney General vs. Detroit, 112 Mich., 145.

State vs. Valle, 41 Mo., 29.

In People vs. Curley, 5 Colo., 412, a police magistrate was held to be an officer under the state, because the office was created by state statute, and his duties pertained to the maintenance of public order and the administration of justice; but the court distinguished between such an official and one whose duties were solely confined to municipal matters, saying (p. 419):

> "It must be borne in mind that there is a legal distinction between state officers—that is, officers whose duties concern the state at large, or the general public, although exercised within defined limits—and municipal officers strictly, whose functions relate exclusively to the particular municipality.

'The administration of justice, the preservation of the public peace and the like, although confined to local agencies, are essentially matters of public concern, *while the enforcement of municipal by-laws proper, the establishment of gas-works, of water-works, the construction of sewers and the like, are matters which pertain to the municipality as distinguished from the state at large.*' Dillon on Municipal Corporations, secs. 33, 34, 773." (Italics ours.)

The decision of the same court in the unreported case of Hilts vs. Arnold, in holding that the assessor was a state officer, was, for similar reasons, undoubtedly sound. The assessor is, under the Constitution of Colorado, a state officer, performing within a limited territory functions of a governmental character.

In David vs. Portland, 14 Ore., 98, it was held that a water committee appointed by statute to provide a city with waterworks were not "officers under the Constitution," and therefore were not required to take an oath of office as prescribed in the case of such officers. Furthermore, it was held that the members of a water commission placed in charge of municipal waterworks for a period of ten years were not *officers*, but were only *agents* of the corporation, and therefore the act was not in violation of a constitutional provision providing that "the legislative assembly shall not create any office the term of which shall be longer than four years."

Attorney General vs. Detroit, 112 Mich., 145, was a mandamus proceeding against the Common Council of Detroit to require that body to call an elec-

tion to fill a vacancy in the office of mayor, which vacancy, it was alleged, had occurred by reason of the fact that Mayor Pingree had been elected governor of the state. Reliance was had upon a provision of the state Constitution that "no member of Congress, nor any person holding office under the United States or this state, shall execute the office of governor." It was held that, as many of the functions of the mayor were of a public and state character, as distinguished from those relating to municipal affairs, he held an office under the state; but the court distinguished between a public officer and one whose duties pertain solely to municipal matters, such as water supply, saying (p. 147):

> "Many cases have arisen upon similar provisions of the various Constitutions, and, while the decisions are not altogether uniform, we shall find them in substantial harmony upon two propositions, viz.: First, that an officer of a city, *whose duties are simply and purely municipal*, and who has no function pertaining to state affairs, does not come within the constitutional description of officers holding office under the state; and, second, where officers in cities are appointed or elected by the community in obedience to laws of the state which impose duties upon them in relation to state affairs, *as contradistinguished from affairs of interest to the city merely, such as relate to gas-works, sewers, waterworks, public lighting, etc.*, they are upon a different footing,

and may properly be said to hold office under the state.

* * * * * *

* * * *It is quite probable that, if a municipal officer had duties pertaining only to the city's private affairs or property, as gas- or waterworks, sewers, etc., respondent's contention would be correct.*" (Italics ours.)

State vs. Valle, 41 Mo., 29, is the only case cited by petitioners which upon its face might lend some support to their argument. But, when analyzed in the light of a subsequent decision of the same court we shall mention, its unimportance is apparent. The opinion merely held that officers of a municipal corporation elected under the direct authority of a state statute are civil officers within the meaning of the provisions of the Missouri Constitution, and in reaching this conclusion the court said (p. 31):

> "The offices are created and the officers are appointed, and their powers given, and their duties defined, and their salaries fixed, directly by act of the legislature. They exercise a share of the powers of civil government, and their authority comes directly from the state."

This is not true of any of the officers of the City and County of Denver made defendant in the present case, as all thereof, including the mayor, and particularly the principal defendants constituting the Public Utilities Commission, hold their respective offices

under the charter of the City and County of Denver adopted by vote of the people in that municipality and not by the state at large.

The later decision in Britton vs. Steber, 62 Mo., 370, completely differentiates the Valle case from the one where the officers were elected under a city charter. The question in that case was whether a mayor was a state officer under a constitutional provision giving the appellate court in St. Louis County final jurisdiction except where the title to an office under the state was brought in contest. The court said (p. 374):

> "We do not regard the mayor of a city as an officer under the state within the meaning of the constitutional provision. There is a recognized distinction between state officers, whose duties concern the state at large, or the general public, although exercised within defined territorial limits, and municipal officers, whose functions relate exclusively to the particular municipality. (Dill., Mun. Corp., sec. 33.) A state officer may be connected with some of the municipal functions, but he must derive his powers from a state statute and execute his powers in obedience to a state law. (State vs. Valle, 41 Mo., 29.) *Whilst it is true that the state grants the charter under which a city is organized and acts, yet those elected in obedience to that charter perform strictly municipal functions,* and do not act in obedience to state laws in the manner enjoined upon state officers. Therefore, if the mayor is not a state officer,

> in a contest relating to the title to the office, the Court of Appeals would be the court of last resort. But in the present case this court is asked to assume jurisdiction where we think it is plain that it was not intended that we should have it."

And in the later case of State vs. Dillon, 90 Mo., 229, it was held that a sheriff was not a "state officer" within the meaning of the Constitution of Missouri, giving the Supreme Court exclusive appellate jurisdiction in causes where "any state officer is a party."

With quotations from a few other authorities, we shall leave this branch of the discussion.

> "Questions have arisen under special constitutional provisions respecting the authority of the legislature over municipal offices and officers. And here it is important to bear in mind the before-mentioned distinction between *state officers*—that is, officers whose duties concern the state at large, or the general public although exercised within defined territorial limits — and *municipal officers*, whose functions relate exclusively to local concerns of the particular municipality. The administration of justice, the preservation of the public peace, and the like, although confided to local agencies, are essentially matters of public concern; while the enforcement of municipal by-laws proper, *the establishment of gas-works, of local water-works, the construction of local sewers, and the like, are matters which ordinarily pertain*

to the municipality as distinguished from the state at large." (Italics ours.)

1 Dillon on Municipal Corp. (fifth edition), sec. 97.

"Waterworks are essentially matters of local and municipal concern, and a board organized to control them, and whose functions relate exclusively to them, is a municipal, and not a state, agency. Members of the water board are 'officers' of the city."

28 Cyc. Law and Procedure, 567.

"An office of the state (within the meaning of act of February 3, 1849, which declares that 'whenever vacancies shall exist or shall occur in any of the offices of this state * * * the governor shall appoint some suitable person,' etc.) must at least be an office directly created by Constitution or statute."

People vs. Conover, 17 N. Y., 64, on 67.

See also:

Ex parte Willey, 54 Ala., 226, on 228.
Brock vs. Bruce, 58 Vt., 261.
State vs. Burns, 38 Fla., 368, 395.

Even assuming that section 17 of the Commerce Court Act controls, the opinion of the three judges sitting in the Court of Appeals complies with the provisions thereof.

The section in question requires that applications for interlocutory injunctions in suits brought to restrain the enforcement of a statute of a state by re-

straining the action of an officer of the state shall be heard by three judges, one of whom must be either a justice of the Supreme Court or a circuit judge. Circuit Judge Hook and District Judges Riner and Reed sat in the Circuit Court of Appeals upon the appeal, and their opinion not merely upheld the exercise of discretion by the lower court in granting the injunction, but went into the merits of the matter and determined that the injunction was properly issued. Appellants have, therefore, had a hearing before the three judges competent to hear applications for injunctions under section 17 of the Commerce Court Act. True, these judges sat in the Court of Appeals and heard the case on appeal, but it was not necessary (even if permissible) that the application be before the Circuit *Court*. Three qualified judges sitting in chambers have the power under section 17 to hear and determine the application.

The bill stated a cause of action within the cognizance of the Circuit Court, which wisely exercised its discretion in granting the injunctions now complained of; and if the facts averred be proven upon final hearing, complainant Trustee would be entitled to a decree of injunction and specific performance.

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Office Supreme Court
FILED
OCT 9 1912
JAMES H. McKE

In the Supreme Court of the United States.

October Term, 1912.

No. 642.

THE CITY AND COUNTY OF DENVER, ET AL.,
PETITIONERS,
vs.
THE NEW YORK TRUST COMPANY, ET AL.,
RESPONDENTS.

No. 643.

THE CITY AND COUNTY OF DENVER, ET AL.,
PETITIONERS,
vs.
THE DENVER UNION WATER COMPANY, ET AL., RESPONDENTS.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF OF THE DENVER UNION WATER COMPANY.

GERALD HUGHES,
CLAYTON C. DORSEY,
Solicitors for The Denver Union Water Company.

The Smith-Brooks Printing Co., Press, Denver, Colo.

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SUBJECT INDEX

	Page
IENT	1–20
—RIGHTS OF WATER COMPANY BASED UPON CON-T	20–188
A consideration of Certain General Principles	20–25
On December 16, 1870, the Easement in the Streets was Granted. It Ever Since Has Been and Is Now a Vested Property Right. The Relation Then Begun Has Continued without Interruption to the Present Day	25–36
Contract of May 9, 1874	36–51
Ordinance 44, Series of 1890	51–100
a) Circumstances and conditions which preceded, surrounded and induced the making of the contract	51–59
b) Provisions of the contract analyzed	60–76
c) Contemporary construction and estoppel	76–100
Ordinance 163, Series of 1907	100–109
Contentions of the City Respecting the Construction of the Contract	109–119
The Limitation, impairment or Restriction of Power of City to Acquire a Municipal Plant Is Neither Involved Nor Controlling in This Suit	119–137
Exhibit "C" (Charter Amendment Section 264A)	120–127
The Contract Evidenced by Ordinance 44, Series of 1890, Was within the Power of the City to Make	138–161
) The twenty-year limitation does not relate to the contract	139–145
) The twenty-year limitation did not affect the street rights	145–154
) Petitioners' contentions in this regard	154–161
reet Rights and Contracts in Former Municipalities Now cluded in City and County of Denver	162–165
ts of the City and Its Officers, Which Are Complained Of	165–188
) General discussion	165–173
) Impairment of contract obligation in violation of section 10, Article I, of the Constitution of the United States	174–184
) Deprivation of property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States	184–186
) Quieting title, removal of cloud and prevention of injury to contract and property rights	186–188

Page

PART II—BECAUSE OF THE INVALIDITY OF SECTION 264A THE WATER COMPANY IS ENTITLED TO RELIEF UPON ITS CROSS-BILL, EVEN THOUGH IT BE HELD: (a) THAT IT NOW HAS NO CONTRACT WITH THE CITY RESPECTING A WATER SUPPLY FOR MUNICIPAL PURPOSES; OR (b) THAT IT NOW HAS NO CONTRACT RELATIVE TO THE MAXIMUM CHARGES TO BE MADE TO PRIVATE CONSUMERS; OR (c) THAT ITS TENURE OF THE STREET RIGHTS IS NOT OF DEFINITE DURATION, BUT SUBJECT TO REVOCATION, THOUGH NOT YET REVOKED; OR (d) EVEN THOUGH IT BE HELD THAT ALL OF THESE CONDITIONS EXIST 189–280

1. The Water Company's Right to Such Relief 189–213
2. Section 264A Was Never Adopted and Is Not in Effect, Because the Method of Its Submission and Adoption Was in Violation of the Provisions of the State Constitution, the Charter of the City and the General Law. Several Independent, Unrelated and Non-Germane Subjects Were Contained Therein; Yet It Was by Initiative Petition Submitted and Voted upon as an Entirety 213–248
3. Section 264A Is Void in so far as It Constituted the Election of Anderson, Van Cise and Fellows as Public Utility Commissioners, Because in Contravention of the Charter and Statutes on This Subject 248–252
4. Section 264A Is Void Because It Conflicts with Article XX of the Colorado Constitution Relative to the Granting of Franchises 253–255
5. Section 264A Is Void If It Be Considered as a Charter Amendment, No Charter Convention Having Been Called to Consider It as by the Constitution Provided 255–258
6. Section 264A Is Void Because in Attempting to Acquire a Municipal Water Plant, Either by Purchase or Construction, It Failed to Comply with a Single Provision of Article IX of the Existing Charter 258–264
7. Power of the Federal Court to Hear and Determine the Objections to Section 264A Contained in Foregoing Subdivisions 2 to 6, Inclusive 265–268
8. Section 264A Is Void Because It, and the Acts of the City Thereunder, Amount to a Denial of the Equal Protection of the Laws Guaranteed by the Fourteenth Amendment to the Federal Constitution 268–274
9. Section 264A Is Void Because It, and the Acts of the City Thereunder, Constituted a Deprivation of Property without Due Process of Law, Contrary to the Fourteenth Amendment to the Federal Constitution 274–280

PART III—CONTENTIONS OF PETITIONERS RELATIVE TO THE CROSS-BILL AND THE CASE MADE THEREBY 281–328

1. Contention that the Cross-Bill Cannot Be Sustained as a Taxpayer's Bill 281–284
2. Petitioners' Contention that the Cross-Bill Is Improper Because Not Germane 285–309
3. Alleged Non-Performance of the Provisions of Ordinance 44 of 1890 by the Water Company 309–319

Page

4. Alleged Estoppel against the Water Company 320–324
5. The City Has No Power to Acquire Simultaneously Two Complete and Independent Water Systems 324–326
6. Certain Contentions of Petitioners' Relative to Section 264A . 326–328
   (a) That said section operates prospectively only, and, therefore, could not impair the obligation of contract .. 326
   (b) That the City's breach of contract was complete upon April 10, 1910, and, therefore, subsequent legislation is to be disregarded 326–327
   (c) That the City was by legislation antedating Ordinance 44, Series of 1890, authorized to "construct or purchase waterworks for the use of the City," and that, therefore, the exercise of that power subsequent to the enactment of said ordinance cannot be regarded as an impairment 327–328

PART IV. PETITIONERS' CONTENTION THAT THE CROSS-BILL MUST FAIL FOR LACK OF FEDERAL JURISDICTION 328-375

1. Diversity of Citizenship 330-353
   Appellants' Authorities 351-353
2. Appellants' Contention that if the original bill fails, the cross-bill must fail without regard to its jurisdictional allegations 353-357
3. Realignment of parties requires realignment of contentions, thus importing into the original bill the Federal questions presented by the cross-bill 357-359
4. Federal questions presented by the cross-bill 359-363
5. Petitioners' Contention that acts in violation of provisions of the Federal Constitution present no federal question if they also violate like provisions of the State Constitution (Doctrine of Barney vs. City of New York, 193 U. S., 430) 364-375

PART V. PETITIONERS' CONTENTION THAT THE TEMPORARY INJUNCTIONS WERE ISSUED BY A TRIBUNAL FORBIDDEN, UNDER A RECENT FEDERAL STATUTE, TO MAKE THE ORDERS 375-377

CONCLUSION 377-380

TABLE OF CASES AND AUTHORITIES

Title of Case.	Pages in Brief on Which Case is Found.
Atchison Street Railway Co. vs. Mo. Pac. Ry. Co., 31 Kan., 660; 3 Pac., 284	29
Abbott on Municipal Corporations, Vol. 3, p. 2165	84
Accumulator Co. vs. Dubuque St. Ry. Co., 64 Fed., 70	52
Andrews vs. Pipe Co., 61 Fed., 782	29
American Smelting Co. vs. Colorado, 204 U. S., 103	182
American Federation of Labor vs. Buck's Stove & Range Co., 33 App. D. C., 83; 32 L. R. A., 749	198
Allgeyer vs. Louisiana, 165 U. S., 589; 41 L. Ed., 835	199
Armstrong vs. Berkey, 99 Pac., 921	227
American & English Enc. of Law, Vol. 21 (2nd Ed.), p. 47	234
Abbott's Municipal Corporations, Vol. 2, sec. 457, p. 1155	275
Ashe Carson Co. vs. Bonifay, 147 Ala., 376; 41 So., 816	302
Ames Realty Co. vs. Big Indian Min. Co., 146 Fed. Rep., 166	292
Ayers vs. Chicago, 101 U. S., 184	308
Board vs. Aspinwall, 21 How., 539	85
Beadles vs. Smyser, 209 U. S., 393	85
Bullock vs. Grinstead, 95 Ky., 261; 24 S. W., 867	76
Boone County vs. Burlington, 139 U. S., 684	86
Bissell vs. City of Jeffersonville, 24 How., 287	84, 86
Brown vs. Duplessis, 14 La. Ann., 842	29
Blair vs. City of Chicago, 201 U. S., 400	13, 187, 345
Bienville Water Sup. Co. vs. Mobile, 146 U. S., 212	130
Bienville Water Sup. Co. vs. Knoxville, 175 U. S., 109	129
Brummitt vs. Ogden Water Works Co., 33 Utah, 289; 93 Pac., 828	153, 154
Bradley vs. Lightcap, 195 U. S., 1	185
Bartlesville Elec. L. & P. Co. vs. Bartlesville Interurban R. Co., 26 Okla., 453; 109 Pac., 228	193
Board of Trade vs. L. A. Kinsey Co., 130 Fed., 507	197
Bitterman vs. Louisville & Nashville, 207 U. S., 205	201
Brown vs. Carl, 111 Iowa, 608; 82 N. W., 1033	227, 232
Board of Trade vs. Christie Grain & Stock Co., 198 U. S., 236	197
Butchers' Union S. H. & L. S. L. Co. vs. Crescent City L. S. L. & S. H. Co., 111 U. S., 762; 28 L. Ed., 588	199
Blythe vs. Hinkley, 84 Fed., 228	301
Bradford vs. San Francisco, 112 Cal., 537; 44 Pac., 912	283
Burton vs. U. S., 196 U. S., 283	266, 363
Bates on Federal Equity Procedure, sec. 376	286
Bates on Federal Equity Procedure, sec. 386	356
Bates on Federal Equity Procedure, par. 310, p. 371	321
Bates on Federal Equity Procedure, sec. 252	330
Bigelow on Estoppel (4th Ed.), pp. 445, 448	320
Bowdin College vs. Merritt, 63 Fed., 213	341
Bowker vs. U. S., 186 U. S., 135	356
Badger Gold Mining Co. vs. Stockton Min. Co., 139 Fed., 838	356
Barney vs. City of New York, 193 U. S., 430	364, 370, 373

Title of Case.	Pages in Brief on Which Case is Found.
Charter, City and County of Denver, sec. 20, sec. 178	218, 248
Charter, City and County of Denver, sec. 179	218
Cauble vs. Craig, 94 Mo. App., 675; 69 S. W., 49	193
Cyc. Vol. 38, p. 760	201
Chicago, Milwaukee & St. Paul vs. Westby, 178 Fed., 619	271
City of Leavenworth vs. Wilson, 69 Kan., 74; 76 Pac., 400	227, 234
City of Mobile vs. Bienville Water Sup. Co., 130 Ala., 379; 30 So., 445	197
Cain vs. Smith, 117 Ga., 902; 44 So., 5	227, 240
City vs. Riplinger, 30 Wash., 281	245
Chicago, Burlington & Quincy R. R. vs. Chicago, 166 U. S., 226	186
City vs. McCall, 95 Tex., 555, 68 S. W., 791	283
Curtenius vs. G. R. & S. R. R., 37 Mich., 583	282
Cascaden vs. Waterloo, 106 Ia., 673; 77 N. W., 333	282
Chicago vs. Nichols, 177 Ill., 97; 52 N. E., 359	283
Crampton vs. Zabriskie, 101 U. S., 601	283
Crisman vs. Heiderer, 5 Colo., 589	302
City vs. Cumberland Tel. & Tel. Co., 174 Fed., 739	29
Constable vs. National Steamship Co., 154 U. S., 51	78
C. R. I. & P. Co. vs. Denver & Rio Grande, 143 U. S., 596	51
Chicago, Great Western Co. vs. Northern Pacific, 101 Fed., 792	79
City and County of Denver, et al. vs. New York Trust Co., et al., 187 Fed., 890	15, 57
Convers vs. Fort Scott, 92 U. S., 503	86
Clark vs. Washington, 12 Wheat., 40	85
Chicago vs. Sheldon, 9 Wall., 50	77
Cavazos vs. Trerino, 6 Wall., 773	77
City vs. Union Pacific, 137 Fed., 869	29
County of Randolph vs. Post, 93 U. S., 502	85
City of Newton vs. Levis, 79 Fed., 715	29, 378
City of Denver vs. Denver Union Water Co., 41 Colo., 76	164, 310
City of Omaha vs. Omaha Water Co., 218 U. S., 180	165
Citizens Street Ry. Co. vs. City of Memphis, 53 Fed., 715	181
Cleveland vs. City Ry. Co., 194 U. S., 517	13, 188, 367
Clay Center vs. Light & Power Co., 78 Kan., 390	156
Clay Center vs. Light & Power Co., 212 U. S., 564	157
Cooley's Constitutional Limitations (5th Ed.), 484	271
Cotting vs. Kansas City Stock Yards Co., 183 U. S., 79	271
City of Sioux Falls vs. Farmers L. & T. Co., 136 Fed., 721	205
Cent. R. Co. vs. Pa. R. Co., 31 N. J. Eq., 475	193
Cedar Rapids Water Co. vs. City of Cedar Rapids, 117 Ia., 250; 91 N. W., 1081-1090	212
City of Denver vs. Hayes, 28 Colo., 110	227, 228-230, 231, 232, 244, 247
City of Leavenworth vs. Leavenworth City Water Co., 69 Kan., 82; 76 Pac., 451	211
Connolly vs. Union Sewer Pipe Co., 184 U. S., 540	273
Carroll vs. Campbell, 108 Mo., 550; 17 S. W., 884	193
City of Omaha vs. Omaha Water Co., 156 Fed., 922	317, 318
Cross vs. Davalle, 1 Wall., 5	308
Central R. R. Co. vs. Mills, 113 U. S., 249	337
Chicago vs. Mills, 204 U. S., 321	337, 345, 346
Cheever vs. Wilson, 9 Wall., 108	346
Crawford vs. Neal, 144 U. S., 585	346

Title of Case.	Pages in Brief on Which Case is Found.
Craig vs. Dorr, 145 Fed., 307	356
Cockrell vs. Warner, 14 Ark., 364	354
City of Denver vs. Hallett, 34 Colo., 393	366
Colo. & Eastern R. R. Co. vs. Chicago, Burlington & Quincy R. R., 141 Fed., 898	378
Colorado Constitution, Art. XX, secs. 4, 5	253, 254, 256, 366
Colorado General Laws (1877), secs. 191, 194, pp. 143, 145	159
Colorado General Laws (1883), sec. 180, p. 238; sec. 181, p. 240	159
Colorado Session Laws (1866), secs. 8 and 9, p. 100	28
Colorado Session Laws (1874), secs. 6, 59, pp. 264, 270	39, 40
Colorado Session Laws (1889), secs. 9, 23	138
Colorado Session Laws (1893), sec. 24, p. 155	140
Colorado Revised Statutes (1868), secs. 7, 8, 9, p. 107	28, 29
Colorado Revised Statutes (1868), secs. 1, 2, pp. 117, 118	159
Colorado Revised Statutes (1908), secs. 847, 854, pp. 362, 363	159
Colorado Revised Statutes (1908), sec. 675, p. 327	29
Colorado Revised Statutes (1908), p. 56, Art. XX	163, 366
Colorado Revised Statutes (1908), sec. 2235, p. 650	219, 223, 248
Cook vs. Foley, 152 Fed., 41	52, 79
City Ry. Co. vs. Citizens Street R. Co., 166 U. S., 537	86, 326
Chicago Co. vs. Town, 130 Ill., 42; 22 N. E., 617	31
Colorado Springs vs. Colorado City, 42 Colo., 75	21, 87
City vs. Bull, 106 Ill., 337	29
Colorado Springs vs. Colorado & Southern Ry., 38 Colo., 112	22, 36, 80, 87
Colo. Central Co. vs. Mollandin, 4 Colo., 154	29
City of Seattle vs. Stirrat, 55 Wash., 560; 104 Pac., 834-836	87
City vs. Bartholemew (C. C. A., 5th Cir.), 107 Fed., 349	36, 87
City of Denver vs. Hubbard, 17 Colo. App., 346	139, 140, 141, 164
California Reduction Co. vs. Sanitary R. Co., 199 U. S., 306; 126 Fed., 29	143
City vs. Yates, 104 Me., 506; 72 Atl., 335, 339	143
City of Duluth vs. Duluth Gas & Water Co., 45 Minn., 210; 47 N. W., 781	144
City of Vincennes vs. Citizens Co., 132 Ind., 114; 31 N. E., 573	144
Des Moines St. Ry. Co. vs. Des Moines Broad-Gauge St. Ry. Co., 73 Iowa, 513; 33 N. W., 610	29
District of Columbia vs. Gallaher, 124 U. S., 505	78, 83
Des Moines Railway Co. vs. City of Des Moines, 151 Fed., 854; 214 U. S., 179	45, 46, 47, 70, 87, 362
Dickerson vs. Colgrove, 100 U. S., 578	81
Dillon on Municipal Corporations (5th Ed.) secs. 109, 1212; 1265; 1303, note 3; 1304	21, 22, 29, 30, 33, 161, 163
Denver Tramway Company vs. Londoner, 20 Colo., 150	87
Detroit Citizens Street Railway Co. vs. City of Detroit, 64 Fed., 628	23, 29, 31, 33, 160
Detroit vs. Detroit Citizens R. Co., 184 U. S., 368	13, 23, 33, 34, 182, 188
Donahue vs. Morgan, 24 Colo., 389	130, 137
Douglas' Appeal, 118 Pa., 65; 12 Atl., 834	193
Dobbins vs. Los Angeles, 195 U. S., 223	200, 277
Davenport vs. Buffington, 97 Fed., 234	283
Davis vs. American Christian Union, 100 Ill., 313, 317	302
Dawson vs. Vickery, 150 Ill., 398; 37 N. E., 910	302
Davenport vs. Dows, 18 Wall., 626	337
Doctor vs. Harrington, 196 U. S., 579	337

Title of Case.	Pages in Brief on Which Case is Found.
Dodge vs. Woolsey, 18 How., 331	335
Dickerman vs. Northern Tr. Co., 176 U. S., 181	345
Dawson vs. Columbia Trust Co., 197 U. S., 178	351
Davis vs. Gray, 16 Wall., 221	240
Daniel's Ch. Pl. (vol. 3), 1943	254
Denver & Rio Grande Ry. Co. vs. U. S., 124 Fed., 156	377
Elliott on Roads & Streets (2nd Ed.), sec. 752	31
Ex Parte Young, 209 U. S., 123	200, 277, 362
Ex Parte Railroad Co., 95 U. S., 211	201
Ewart on Estoppel, pp. 10, 11	320
Ellison vs. Corsin, 88 Fed., 581	378
Field vs. Schieffelim, 7 Johns. Ch., 252	254
Foster's Fed. Prac. (vol. 1), pp. 606, 607	256
Farmers Loan & Trust Co. vs. City of Sioux Falls, 131 Fed., 890	47, 48, 149, 202, 203, 204, 284, 302
Fitzgerald vs. First National Bank, 114 Fed., 474	79
Freeport Water Co. vs. Freeport, 180 U. S., 587	130, 136
Fergus Falls Co. vs. City, 65 Fed., 586	143
Fidelity Co. vs. Fowler, 113 Fed., 560	142
First State Bank vs. Shallenberger, 172 Fed., 999	277
Farmers Loan & Trust Co. vs. Sioux Falls, 136 Fed., 721	245
Farrington vs. Tennessee, 95 U. S., 683	180
First National Bank vs. Salem Co., 31 Fed., 580	301
Fallbrook Irrigation Dist. vs. Bradley, 164 U. S., 112	266, 363
Foster's Fed. Prac. (4th Ed.), Sec. 170	288
Gregston, et al. vs. City of Chicago, 145 Ill., 451	29
Gelpcke vs. City of Dubuque, 1 Wall., 175	83
Grand Rapids vs. Grand Rapids Hydraulic Co., 66 Mich., 606; 33 N. W., 749	30, 164
Gibbon vs. Times Republican Printing Co., 114 Fed., 92	82
Green vs. Ivey, 45 Fla., 338; 33 So., 711	193
Garrigus vs. Commissioners, 39 Ind., 66	246
Gulf, Colo. & Santa Fe vs. Ellis, 165 U. S., 150	273
Gas & Water Co. vs. City of Elyria, 57 Ohio State, 374; 49 N. E., 335	227, 236
Gompers vs. Buck's Stove & Range Co., 221 U. S., 418	198
Gamble vs. Rural School Dist., 146 Fed., 113	181
Graham vs. Folsom, 200 U. S., 248	182
Green vs. Biddle, 8 Wheat., 84	180
Gray, et al. vs. Mount, et al., 45 Iowa, 591	230
Gibson on Suits in Chancery (2d Ed.), sec. 737	304
Graves vs. Ashburn, 215 U. S., 331	304
Gaddie vs. Mann, 147 Fed., 955	330
Groel vs. United Elec. Co., 132 Fed., 252	337, 342
Hallinger vs. Davis, 146 U. S., 314	142
Home Tel. Co. vs. Los Angeles, 211 U. S., 265	130, 136, 360
Helena Water Works Co. vs. Helena, 195 U. S., 383	130, 134, 176
Hamilton Gas Light Co. vs. Hamilton City, 146 U. S., 258	130, 132, 369
Hurley vs. Vaughn, 115 Wis., 470; 91 N. W., 971	143
Huntting Elevator Co. vs. Bosworth, 179 U. S., 415	78
Hopkins vs. Gilman, 22 Wis., 454	76

Title of Case.	Pages in Brief on Which Case is Found.
Hitchcock vs. Galveston, 96 U. S., 341	86
Hester vs. Town of Greenwood, Ind., 88 N. E., 498	165
Hudspeth vs. Hall, 111 Ga., 510; 36 S. E., 770	193
Hopkins vs. Oxley Stave Co., 83 Fed., 912	198, 199
Hurd vs. Case, 22 Ill., 45	202
Horner vs. U. S. (No. 2), 143 U. S., 570	266, 343
Haberman vs. Kaufer, 60 N. J. E., 271; 47 Atl., 48	202
Herman on Estoppel, Vol. 1, sec. 7	320
Hartog vs. Memory, 116 U. S., 588	329
Hill vs. Walker, 107 Fed., 241	330
Howe vs. Howe & Owen Co., 154 Fed., 820	330, 355
Howard vs. National Tel. Co., 182 Fed., 215	342
Harriman vs. Northern Security Co., 197 U. S., 244	379
In re Gilligan, 152 Fed., 605	142
Incorporated Town vs. Guinn, 5 Ind. Ter., 497; 82 S. W., 886	143
Illinois Trust Co. vs. Arkansas City, 76 Fed., 271	21, 86, 142, 144
Indianapolis Cable Co. vs. Citizens St. Ry. Co., 127 Ind., 369; 24 N. E., 1054; 26 N. E., 893; 8 L. R. A., 539	31
Insurance Co. vs. Dutcher, 95 U. S., 269	78
Iron Mountain Co. vs. City of Memphis, 96 Fed., 128	183
In re Metropolitan Receivership, 208 U. S., 90	345, 348
In re Cleland, 218 U. S., 120	345, 349
Jackson vs. Simmons, 98 Fed., 768	356
Joplin vs. Light Co., 191 U. S., 150	130, 133
Jersey City Gas Co. vs. Dwight, 29 N. J. Eq., 242	192
Jones vs. Missouri Edison Co., 144 Fed., 765	284, 305
Jordan vs. Logansport, 171 Ind., 280; 86 N. E., 47	282
Kenicott vs. Supervisors, 16 Wall., 452	86
Kaukauna Electric Light Co. vs. Kaukauna, 114 Wis., 327	22
King vs. Wilson, 98 Va., 259; 35 S. E., 727	76
Kirk vs. Hamilton, 102 U. S., 78	81
Knox County vs. Bank, 147 U. S., 91	78
Knoxville Water Co. vs. Knoxville, 200 U. S., 22	129, 280
Kiernan vs. Portland, 223 U. S., 151	246
Kinsey Co., L. A., vs. Board of Trade, 198 U. S., 236	197
Kelly vs. Boettcher, 85 Fed., 55	305
Knopf vs. First Nat'l Bank, 173 Ill., 331; 50 N. E., 660	282
Kingsbury vs. Buckner, 134 U. S., 650	298
Kelly vs. Miss. River Coaling Co., 175 Fed., 482	342
Knickerbocker Trust Co. vs. City of Kalamazoo, 82 Fed., 865	351
Kerby vs. Am. Soda Ftn. Co., 149 U. S., 141	355
Kemp vs. Mackrell, 3 Atk., 812	354
Long Island Water Sup. Co. vs. Brooklyn, 166 U. S., 685	130, 135
Los Angeles vs. Los Angeles Water Co., 177 U. S., 558	71, 72, 73, 86, 130, 136, 143, 145
Leadville vs. Sewer Co., 47 Colo., 118	130
Little Falls vs. Little Falls, 102 Fed., 663	143
Los Angeles Co. vs. City of Los Angeles, 193 Fed., 711	145
Los Angeles Co. vs. City of Los Angeles, 88 Fed., 720	71, 72, 73, 86, 136, 143, 145

Title of Case.	Pages in Brief on Which Case is Found.
Louisville & Nashville Co. vs. Bowling Green Co., 22 Ky. Law Rep., 272; 62 S. W., 4, 6-7	153
Los Angeles Water Co. vs. City of Los Angeles, 102 Fed., 711	68, 71, 72, 126, 149, 205, 211
Lowrey vs. Territory of Hawaii, 206 U. S., 206	78
Long Lumber Co. vs. Stump, 86 Fed., 574	78
Long Island Co. vs. Conklin, 32 Barb., 381	74
Louisville vs. Cumberland Tel. Co., 224 U. S., 649	23, 33, 34, 36, 58, 59, 112
Lost vs. Pacific Mill & Milling Co., 88 Fed., 957; 94 Fed., 968	83
Lewis vs. City of Newton, 75 Fed., 884	29
Leighton vs. City of Carthage, 175 Fed., 145	275
Lozier vs. Alexander Drug Co., 99 Pac., 808	227
Louisville & Nashville vs. Bitterman, 144 Fed., 34	201
Lewis vs. County of Bourbon, 12 Kan., 186	227, 238, 248
Lamb vs. Powder River Co., 132 Fed., 434	180, 185
Louisiana vs. New Orleans, 102 U. S., 207	180
Langdell's Equity Pleadings, sec. 155	288
Lant vs. Kinne, 75 Fed., 636	306
Lehigh Min. & Mfg. Co. vs. Kelly, 160 U. S., 327	345
Loose vs. Hartford Plaster Corp., 159 Fed., 318	342
Lowenstein vs. Glidewell, 5 Dill., 325; F. C. No. 8575	357
Miner vs. New York Central Railroad Co., 123 N. Y., 242	33
Manhattan Life Ins. Co. vs. Wright, 126 Fed., 82	79
Morgan vs. Railroad Co., 96 U. S., 716	80
Mercer County vs. Hackett, 1 Wall., 83	86
Moultrie County vs. Savings Bank, 92 U. S., 631	86
Meyer vs. Muscatine, 1 Wall., 384	86
Mercantile Trust Company vs. City of Denver, 161 Fed., 769	30
Moran vs. Commissioners, 2 Black, 722	85, 86
Mayor of Knoxville vs. Africa, 77 Fed., 501	31
McGonigle vs. City of Defiance, 140 Fed., 621	87
Minneapolis vs. Street Railway Co., 215 U. S., 417	23, 33, 183
Minneapolis vs. Minneapolis Co., 155 Fed., 989	143
Memphis Co. vs. Williamson, 9 Heisk., 314	143
McPhee & McGinnity vs. Union Pacific R. R. Co., 158 Fed., 1	150, 151, 152
Mercantile Trust Co. vs. Columbus, 203 U. S., 311	183, 362
McBee vs. Brady, 100 Pac., 97	227
Mills Ann. Stat., vol. 2, sec. 4403, par. 7th, subdivisions 1, 3, 7, & par. 67, 68, 69	164
Missouri etc. Ry. Co. vs. City, 156 Fed., 624	182
Murray vs. Charleston, 96 U. S., 432	179
McDermott Commission Co. vs. Chicago Board of Trade, 146 Fed., 961	197
McInnis vs. Pace, 78 Miss., 550; 29 So., 385	193
Marcellus vs. Borough, 71 N. J. L., 373; 58 Atl., 1099	227, 239
Millville Gaslight Co. vs. Vineland Light & Power Co., 72 N. J. Eq., 305; 65 Atl., 504	193
Michigan R. R. Tax Cases, 138 Fed. Rep., 223	266, 363, 369
Meissner vs. Buek, 28 Fed., 263	301
Mallery vs. Globe Boston Copper Co., 11 Ariz., 296; 49 Pac., 1116	302
Morgan's Co. vs. Texas Central, 137 U. S., 171	296
McMillan vs. County Judge, 3 Iowa, 311	232
Maybury vs. Louisville J. Ferry Co., 60 Fed., 645	320

Title of Case.	Pages in Brief on Which Case is Found.
Mercantile Trust Co. vs. Texas & Pac., 51 Fed., 529	338
Murdock vs. Woodson, 2 Dill., 188	340
Murdock vs. Memphis, 20 Wall., 619	361
Michigan Cent. vs. Powers, 201 U. S., 245	370
Manigault vs. Ward, 123 Fed., 707	374
Mast, Foos & Co. vs. Stover Mfg. Co., 177 U. S., 485	379
National Water Works Co. vs. Kansas City, 62 Fed., 853	68, 70, 74, 144, 148, 205
National Water Works Co. vs. Kansas City, 65 Fed., 691, 696-697	145, 149
Newburyport Water Co. vs. Newburyport, 193 U. S., 561	130, 136
New Orleans vs. Warner, 175 U. S., 145	142
Nugent vs. Supervisors, 19 Wall., 241	86
Northwestern Ins. Co. vs. Keith, 77 Fed., 374	74
North vs. Platte Co., 29 Neb., 447; 45 N. W., 692	227, 238
National Telegraph News Co. vs. Western Union Tel. Co., 119 Fed., 294	197
Nashville Co. vs. McConnell, 82 Fed., 65	201
Nash vs. Council Bluffs, 174 Fed., 183	245
New Orleans Gas Co. vs. Louisiana Light Co., 115 U. S., 650	160, 182
New Orleans Water Co. vs. Rivers, 115 U. S., 674	160
New Orleans Water Works vs. Louisiana Sugar Co., 125 U. S., 30	183
North British Ins. Co. vs. Lathrup, 70 Fed., 429	301
National Masonic Assn. vs. Sparks, 83 Fed., 225	329
New Albany Water Works vs. Louisiana Banking Co., 122 Fed., 776	342, 344
Nashville vs. Africa, 77 Fed., 501	379
Omaha Water Co. vs. City of Omaha, 162 Fed., 225; 147 Fed., 1	21, 143, 165, 181
Omaha Electric Light Co. vs. Omaha, 179 Fed., 455	34, 51, 148
Ogden City vs. Bear Lake Co., 28 Utah, 25; 76 Pac., 1069	87
Oconto Co. vs. Oconto, 105 Wis., 76; 80 N. W., 1113	143
Omaha Horse Ry. Co. vs. Cable Co., 32 Fed., 727	362
Pike's Peak Power Co. vs. City of Colorado Springs, 105 Fed., 1	21, 164
People vs. Deehan, 153 N. Y., 528	30, 33, 163
People vs. O'Brien, 111 N. Y., 1	31, 32
Pendleton County vs. Amy, 13 Wall., 297	86
Paige vs. Banks, 13 Wall., 608	78
Pacific R. R. Co. vs. McGuire, 20 Wall., 36	182
Planters Bank vs. Sharp, 6 How., 327	180
Powell vs. Pa., 127 U. S., 684	198
Patterson vs. Woolman, 5 N. D., 608; 67 N. W., 1040	193
People vs. Sours, 31 Colo., 369	244
Penn. R. Co. vs. National R. Co., 23 N. J. Eq., 441	192
Pumpelly vs. Green Bay Co., 13 Wall., 166	279
Peacock Co. vs. Thaggard, 128 Fed., 1005	301
Pomeroy's Equity Juris. (3d Ed.), Vol. 1, sec. 260, p. 404-408, note	282
People's Savings Bank vs. Layman, 134 Fed. Rep., 635	266, 363
Pomeroy on Code Remedies, sec. 369, 475 (3d Ed.)	294
Penn. Mut. Life Ins. Co. vs. Austin, 168 U. S., 685	266, 363
Penn. Co. vs. Cole, 132 Fed., 668	320
Piek vs. Railway Co., 94 U. S., 164	340
Pac. States Tel. & Tel. Co. vs. Oregon, 223 U. S., 118	360
Pac. Elec. Co. vs. Los Angeles, 194 U. S., 112	367

Title of Case.	Pages in Brief on Which Case is Found.
Rockefeller vs. Merritt, 76 Fed., 909	52
Reed vs. Anoka, 89 Minn., 294; 88 N. W., 981	143
Railroad Co. vs. Penn., 15 Wall., 300	178
Raritan & D. B. R. Co. vs. Delaware & R. Canal Co., 18 N. J. Eq., 546	192, 194
Riverside Co. vs. City of Riverside, 118 Fed., 736	277
Raymond vs. Chicago Union Traction Co., 207 U. S., 20	186, 277, 370
Rogers vs. Penobscot Min. Co., 154 Fed., 606	284, 305
Royal Union Ins. Co. vs. Wynn, 177 Fed., 289	302
Railroad Co. vs. Schuyler, 17 N. Y., 592	295
Rickey Land & Cattle Co. vs. Miller & Lux, 218 U. S., 259	291
Roses Code, Vol. 1, Sec. 823	306
Railroad vs. Grayson, 119 U. S., 240	337
Reagan vs. Farmers Trust Co., 154 U. S., 362	341
Radcliff vs. Scruggs, 46 Ark., 96	355
State Tax cases, 15 Wall., 320	179
Swan vs. City of Murray, 146 Ky., 148	245, 246
Stein vs. McGrath, 128 Ala., 175; 30 So., 792	212
Southern Ry. Co. vs. Green, 216 U. S., 400	273
Shapleigh vs. San Angelo, 167 U. S., 646	183
Sharp vs. City of South Omaha, 53 Neb., 700; 74 N. W., 76	164
St. Louis etc. Co. vs. Cross, 171 Fed., 480	185
Springfield vs. Barnard Co., 81 Fed., 261	301, 308
State vs. Torinus, 9 N. W., 725	296
Siler vs. Louisville & Nashville R. R. Co., 213 U. S., 175	265, 360, 362, 370
Storey's Equity Pleadings (8th Ed.), pp. 369, 370	286
Snyder vs. Foster, 42 N. W., 506	282
Stuart vs. Hayden, 72 Fed., 402	307
Street's Fed. Eq. Prac., secs. 1020, 1021, 1034, 1037, 1038	288, 291
Street's Fed. Eq. Prac. (Vol. 2), sec. 1031	304
Street's Fed. Eq. Prac. (Vol. 2), sec. 1038	305
Street's Fed. Eq. Prac., sec. 1072	356
Shawnee Sew. & Dr. Co. vs. Stearns, 220 U. S., 462	328
Standard Sanitary Mfg. Co. vs. Arrott, 135 Fed., 750	321
Smith vs. Kernochen, 7 How., 198	346
South Dakota vs. North Carolina, 192 U. S., 286	345
Stone vs. Trust Co., 116 U. S., 307	340
Small vs. Peters, 104 Fed., 401	356
Sanders vs. Village of Riverside, 118 Fed., 720	354
Stephens vs. Smartt, 172 Fed., 466	352
Seattle Co. vs. City of Seattle, 54 Wash., 9; 102 Pac., 767	30, 164
Southern Bell Co. vs. Mobile, 162 Fed., 523	31
Supervisors vs. Schenck, 5 Wall., 772	86
State vs. Milk, 11 Fed., 389	85
Snowhill vs. Snowhill, 23 N. J. Law, 447	74
Shreveport Traction Co. vs. Shreveport, 122 La., 1; 47 So., 40	29
State Trust Co. vs. City of Duluth, 104 Fed., 632	87
Steinbach vs. Stewart, 11 Wall., 566	78
Skaneateles Water Co. vs. Skaneateles, 184 U. S., 354	129, 132, 133, 195, 212
Stein vs. Bienville Water Sup. Co., 141 U. S., 67; 34 Fed., 145	130, 131, 144, 211
State vs. Denny, 4 Wash., 135	227
State, ex rel. vs. Allen, 178 Mo., 555; 77 S. W., 868	234
Speer vs. People, 122 Pac., 768	227, 231, 258
Smith vs. Harkins, 38 N. C. (3 Ired. Eq.), 613	193

Title of Case.	Pages in Brief on Which Case is Found.
State vs. Winnett, 78 Neb., 379; 110 N. W., 1113	250
Smith vs. The State, 28 Okla., 235; 113 Pac., 933, 944	263
State vs. Allen, 186 Mo., 673; 85 S. W., 531	227, 233, 246
State vs. Allen, 183 Mo., 283	246
San Diego Flume Co. vs. Souther, 90 Fed., 164	356
Smalley vs. Langenour, 196 U. S., 93	361
San Francisco Co. vs. San Francisco, 189 Fed., 943	374
St. Paul Co. vs. Northern Pac., 49 Fed., 306	378
Smith vs. Vulcan Iron Wks., 165 U. S., 518	378
Savannah Co. vs. Savannah, 198 U. S., 392	368
Tramway Co. vs. Londoner, 20 Colo., 150	22
Tuttle vs. City of Cedar Rapids, 176 Fed., 86	21
Topliff vs. Topliff, 122 U. S., 121	78
Thomas vs. Cincinnati etc. Ry. Co., 81 Fed., 911	86
Truelson vs. Mayor, 61 Minn., 48; 63 N. W., 714	227, 237
Tugwell vs. Eagle Pass Ferry Co., 74 Tex., 480; 9 S. W., 120	193
Union Pacific vs. McAlpine, 129 U. S., 314	81
United States vs. Utah etc. Stage Co., 199 U. S., 414	52
Union Pacific vs. C. R. I. & P. Ry. Co., 163 U. S., 564	52
United States vs. Gibbons, 109 U. S., 200	52
United States vs. Allen, 179 Fed., 13	305
Union Street Ry. Co. vs. City, 115 Mich., 300; 73 N. W., 243	302
U. S. Rev. Stat., sec. 921	306
U. S. Compiled Stat. (1901), p. 685	306
U. S. Compiled Stat. (1901), p. 575	361
United States vs. Bell Tel. Co., 128 U. S., 315	304
Van Hastrup vs. Madison, 1 Wall., 291	86
Vincennes vs. Citizens Gas Light Co., 132 Ind., 114	22
Vicksburg vs. Vicksburg Water Works Co., 202 U. S., 453	111, 130, 134, 155, 195
Venner vs. Great Northern Ry. Co., 209 U. S., 24	336
Vicksburg vs. Vicksburg, 185 U. S., 65	362
Water, Light & Gas Co. vs. Hutchinson, 207 U. S., 385	130, 135
Walla Walla vs. Walla Walla Water Co., 172 U. S., 1	21, 111, 144, 155, 195
Whitsett vs. Union Depot & R. Co., 10 Colo., 243	29
Woodruff vs. Trapnell, 10 How., 190	85
Winona & St. Peter Co. vs. Minnesota, 159 U. S., 526	52
Water Works Co. vs. Vicksburg, 185 U. S., 65	13, 188
Water Company vs. City of Grand Junction, 14 Colo. App., 424	87
Williamson vs. U. S., 207 U. S., 425	266, 363
Wiles vs. Suydam, 64 N. W., 178	295
Wright vs. Bishop, 88 Ill., 302	283
Webster vs. Harwinton, 32 Conn., 131	283
Westinghouse Air Brake Co. vs. Kansas City So. Ry. Co., 137 Fed., 26	283, 305
Wetmore vs. Rymer, 169 U. S., 115	330
Zabriskie vs. Railroad Co., 23 How., 381	84

In the Supreme Court of the United States.

October Term, 1912.

No. 642.

THE CITY AND COUNTY OF DENVER, ET AL., PETITIONERS,

vs.

THE NEW YORK TRUST COMPANY, ET AL., RESPONDENTS.

No. 643.

THE CITY AND COUNTY OF DENVER, ET AL., PETITIONERS,

vs.

THE DENVER UNION WATER COMPANY, ET AL., RESPONDENTS.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF OF THE DENVER UNION WATER COMPANY.

STATEMENT.

The Denver Union Water Company and its predecessors have since the year 1870 been engaged in the business of supplying the City and County of Denver

and its inhabitants with water. Prior to the commencement of these relations, Denver had been little more than a frontier trading station, and was unprovided with any general water supply.

On December 16, 1870, the council of the City of Denver duly enacted an ordinance and entered into a contract with The Denver City Water Company, incorporated under the laws of the then Territory of Colorado on November 30, 1870 (Printed Record, p. 180). This ordinance and contract is set forth at pages 194 and 195 of the record. Thereby the City of Denver, as it lawfully might, granted to the Water Company the street right or easement "to lay pipes for the distribution of water within the city limits of said city of Denver, and any additions that may hereafter be made thereto."

By the act of incorporation, the Water Company had acquired directly from the Territory of Colorado the right to engage in the business of supplying the City of Denver and its inhabitants with water. Accordingly, the City, at the same time and by the same instrument which had granted the street rights, entered into a contract with the Water Company, whereby the Water Company was required: (1) to erect hydrants, and to furnish water to the municipality for fire and other like purposes at a certain fixed price; (2) to limit its rates charged for water furnished for domestic consumption so that the same should not exceed those charged in the city of St. Louis.

The right to lay pipes granted by this ordinance purported to be exclusive. The ordinance contained no time limitation whatever.

The Water Company accepted this ordinance and proceeded to construct its waterworks, so that by the year 1874 the waterworks were in full operation, and the City, as it then existed, was well supplied through pipes and conduits laid in the streets.

The City, however, became dissatisfied with the hydrant rentals charged by the company and provided for in the original contract. Accordingly, on May 9, 1874, the previous contract was modified, by reducing these hydrant rentals, and also by limiting to seventeen years the period during which the right to lay pipes should be exclusive; but the street rights and other rights conferred by the previous ordinance and contract were otherwise unaffected. (Printed Record, pp. 207-209.)

The original Denver City Water Company was succeeded in the year 1882 by The Denver Water Company, which then acquired all of the property of the precedent company, including all of its rights under the previous ordinances of and contracts with the City of Denver. (Printed Record, p. 181.)

Denver grew rapidly, and by 1890 the frontier town had assumed the aspect of a metropolitan city. The waterworks system kept pace with this growth, so that by the year last mentioned it consisted of nearly one hundred miles of mains, laid in all of the streets of the City, and serving a large population.

Denver is in an arid region. In every locality water is a prime necessity. In Denver, by climatic conditions, the need is increased. Water must be furnished there in greater quantities, because it is required not only for domestic uses, but also to a large extent for the irrigation of lawns, trees and gardens, and for the sprinkling of streets.

But such climatic condition, which renders the need greater, also vastly increases the difficulty and expense of supplying that need. Until the year 1890, Denver's supply had been taken directly from the streams in the vicinity. But the City's growth had been so rapid, and promised to continue at such a rate, that this method of supply was seen to be quite inadequate, not only for present, but particularly for future needs. It was evident that new sources of supply, far distant from the City, must be secured, and immense storage reservoirs provided, so that the City's water supply might be no longer dependent upon the vagaries of the streams in this arid region, in which the flow of water is not constant, but varies from year to year, and with the seasons of the year, sometimes almost entirely failing.

But pressing as was the public need, the cost of supplying it was so great as to make not only the City, but also private investors, hesitate. The city itself was unable to furnish the necessary funds. It sought to induce private investors, and for that purpose to so guard the investment as to render it attractive. Accordingly, Ordinance 44 of the Series of 1890 was enacted on April 10 of that year. It is set forth in the record at pages 146 *et seq.* Thereby a new contract was made with the Denver Water Company. The rights granted by the previous ordinances of 1870 and 1874 were recognized and confirmed, and it was provided that they should continue as independent rights, and not be merged in any rights granted by the new ordinance. A new contract was entered into, requiring the City to take and pay for water for municipal purposes at certain rates, and a

new schedule of rates agreed upon as maximum rates for private consumers.

This ordinance we shall presently analyze in detail. At this point it is sufficient to say that it contained no period of limitation; there was no provision that it should come to an end at any particular time; on the contrary, it was expressly provided that it should continue till the City purchased the plant.

It was provided that at the expiration of twenty years the City might purchase the waterworks system at a price to be fixed by agreement or appraisal, and it was also provided by an alternative section that at the expiration of said period a renewal of said contract with the City, with a 10 per cent reduction in hydrant rentals, might occur. But by the other provisions of the instrument it was definitely agreed that the rights of the Water Company could be terminated in one way only—i. e., by the exercise of the City's right to purchase—and that the Water Company should not be disturbed, nor the business relation of the parties interrupted, until the City had purchased and paid for the plant. *This contract was understood by all parties to mean that at the expiration of twenty years the City must either purchase the plant or permit the relations contemplated by the contract to continue for an additional period of twenty years.*

This was the safeguard offered by the City to induce the investment of private capital. This was the representation made by the City, and upon the faith of which enormous sums were invested in securing new sources of supply, in constructing immense reservoirs in the mountains, in conducting the water therefrom to the City, and in extending the

distributing system so that the City and its inhabitants might at all times be adequately supplied. The City so understood the contract; the Water Company and its successors all so understood it; and the investors who purchased the bonds and stock of the Water Company, thus furnishing the necessary capital, so understood it, and relied upon the contract thus construed as the security for their investment. These facts are undisputed; they are shown, not only by the terms of the contract itself, but likewise by allegations which are quite undenied, and affidavits which are wholly uncontroverted.

It was recognized by all parties that the immense sums necessary to be invested could not be returned within a period of twenty years. It was known to be impossible to charge water rates which would reimburse the investors within that period.

The City announced and acquiesced in this construction of the contract by formal legislative action of its council, in addition to the ordinance in question; by acts of its executive officers charged with the duties of administration in respect thereto; by the formal written opinion of its legal department, and otherwise in every possible way. It never at any time receded, or attempted to recede, from the position so taken until after the immense investment necessary to supply the facilities which it required had been fully made, and not until just prior to the beginning of this litigation, as hereinafter stated.

By the year 1907 the new sources of supply had been obtained, the immense storage facilities requisite had been provided, and the necessary additions to the plant had been made. All of this had cost vast sums

of money, invested on the faith of the contract as it was understood by all parties to be.

In 1907 it occurred to the City that in about three years from that date—to-wit, on April 10, 1910—the time would arrive when it must choose between the alternative of purchasing the property of the Water Company or of allowing the arrangement to continue for an additional period of twenty years.

In some particulars the contract relating to rates had proven unsatisfactory. It was thought that, in case the City did not purchase the plant, rates more satisfactory, both to the City and to the Water Company, might be arranged for the ensuing period of twenty years, than were provided for in the original contract. Accordingly the City approached the Water Company with the request that the right of election which, under said Ordinance 44, accrued on April 10, 1910, might be anticipated; that the City might have the privilege of so electing prior to the expiration of the first twenty-year period; and that, in addition to the two alternatives between which it must choose under the terms of the original ordinance, it might have a third alternative—to-wit, the right to make a new contract concerning the supply of water for municipal purposes, and the price to be paid therefor, and a new schedule of rates for private consumers to be in effect for the ensuing twenty years, instead of the corresponding contract and schedule contemplated by said Ordinance 44. These negotiations resulted in Ordinance 163 of the Series of 1907 and the corresponding contract (Printed Record, pp. 157 *et seq.*); but it was expressly provided therein that the same should be without prejudice to the rights of either party under Ordinance 44 of the Series of 1890.

In accordance therewith, appraisers were appointed and an appraisement had, as provided by Ordinance 44 of 1890. The appraisers were disinterested men, of the highest standing and of more than national reputation in the engineering world. They were all non-residents of Denver. After a most painstaking inquiry, extending over a period of about eighteen months, the appraisers reported that the property of the Water Company devoted to supplying Denver and its inhabitants with water was of a value of fourteen million, four hundred thousand dollars. This report was made in the month of March, 1909. The appraisers were unable to agree upon, and therefore did not report, a schedule of rates; therefore it was impossible to submit the new alternative which Ordinance 163 of 1907 contemplated.

The City took no further steps under the ordinance of 1907; the Water Company could take none. April 10, 1910, the date of the expiration of the first twenty-year period mentioned in Ordinance 44 of 1890, came and went; still the City did nothing. The relations of the parties continued undisturbed. The City continued to take and use the free water to which under Ordinance 44 it was entitled for municipal purposes; it continued to take, use and pay for other water for municipal purposes, as provided in said Ordinance 44, and the Company continued to supply both the City and its inhabitants with water for all uses and purposes, at the rates and upon the conditions contemplated in said ordinance, including the 10 per cent reduction in hydrant rentals to the City; and so continues to this day.

Denver, which is now a city of more than two hundred and fifteen thousand inhabitants, has no other means of water supply. The plant and system of the Water Company, appraised in 1909 at fourteen million, four hundred thousand dollars, is of immense extent, including storage reservoirs (one of them, in the mountains to the southwest of Denver, the largest of its kind in the world), filter plants, numerous conduits, aggregating over seventy miles in length, conveying the water to the distributing system, and a distributing system within the City consisting of over four hundred miles of mains.

On May 17, 1910, thirty-seven days after the time had passed within which the City might exercise its right to purchase the Water Company's plant, a so-called charter amendment, designated as section 264a, was submitted, by the initiative method and upon petition, to the direct vote of the electors of Denver, and received a majority of the votes cast thereon. This measure appears in the record at pages 320 *et seq.*

This peculiar measure we shall presently subject to a critical analysis. For present purposes it is sufficient to say that it contained the very first intimation or suggestion that the City did not consider itself bound by the contract evidenced by Ordinance 44 of the Series of 1890, or that said contract was not of the nature and effect which its terms clearly imported, which both parties had always understood it to be, and upon the faith of which the City had previously obtained the great investment of money necessary to provide an adequate water supply.

Section 264a evidenced and constituted a complete reversal of the attitude which the City had

hitherto consistently maintained for more than twenty years, a complete repudiation of the solemn obligation of its written contract, and an attempted total impairment thereof. Among other things, it created a Public Utilities Commission, and named the members thereof; it assigned to said commission certain duties and invested it with certain powers, in direct conflict with the City's contract obligations to the Water Company; it committed the City to the acquisition of a public utility—to-wit, a waterworks system—and required that water for all uses and purposes be taken therefrom; it offered to the Water Company the sum of seven million dollars in bonds of the City for the existing water plant, being the precise property, and all of the property, which had, at the instance of the City, just been appraised and valued at the sum of fourteen million, four hundred thousand dollars; it required the City, in case said offer should not be accepted by the Water Company by July 1, to proceed with the construction of its own independent plant, from which water should be taken for all uses and purposes; so that the offer of seven million dollars was coupled with the threat of immediate municipal competition, and with the requirement that as soon as the municipal plant was completed the City must break off all relations with the Water Company; it required the holding of an election on the first Tuesday in September, 1910, at which the question of issuing eight million dollars in bonds should be voted upon, the proceeds thereof to be used either to purchase the existing plant of the Water Company or to build said new and independent municipal plant; it required the City Council to call said election, and likewise required the City Council to pass any ordinance per-

taining to said matter which might be introduced at the instance of the Public Utilities Commission. These are only a few of its many provisions, but they suffice for present purposes.

The gentlemen constituting the Public Utilities Commission, as named in said section, proceeded at once to carry out the policy which it inaugurated. They announced, both publicly and privately, that the City would not purchase the plant of the Water Company except at the price of seven million dollars. The Water Company, of course, refused to sell at this price, which was less than one-half of the value recently placed upon the same property by disinterested and distinguished appraisers, and which was insufficient to discharge its bonded indebtedness.

An election was called for the first Tuesday in September; the City Council, for that purpose, and as it was required to do by the terms of section 264a, enacted Ordinance 98 of the Series of 1910, which had been drafted and introduced by the Public Utilities Commission (Printed Record, pp. 170 *et seq.*).

On the eve of this election the Public Utilities Commission promulgated a so-called report, and caused it to be generally distributed among and made known to the citizens of Denver (Printed Record, pp. 216 *et seq.*). By this report, and particularly by its concluding language (Printed Record, pp. 230 and 231), the attitude and purposes of the Public Utilities Commission are made clear. It is, to say the least, more than evident that said commission did not occupy that judicial and impartial attitude indispensable to a body supposed to represent both the City of Denver and all of its citizens and inhabitants, including The Denver Union Water Company, and

supposed to calmly investigate, judicially and judiciously determine, and dispassionately advise concerning matters of vast importance to all concerned.

Under these circumstances, the New York Trust Company, trustee in the mortgage of The Denver Union Water Company, which covered all of its property, including Ordinance 44, Series of 1890, on August 22, 1910, filed its bill in the Circuit Court, setting up the pertinent facts, seeking to prevent by injunction, both temporary and permanent, threatened injury to, if not destruction of, its interest in the property mortgaged by unlawful acts, and likewise seeking an affirmative decree to the effect that the City was under the circumstances required to purchase the property and plant of the Water Company, and a final order enforcing said obligation, upon the allegation that the City was refusing to complete said purchase, and that the Water Company, believing that its best interests would be subserved by continuing the contract relations, was refusing to bring suit to enforce said obligation to purchase.

To this bill the Water Company filed its answer, admitting such facts as were matters of record; admitting the previous acts of the City, about which there could be no dispute; but denying that, under the circumstances, the Water Company was under any obligation to bring suit to force the City to complete the purchase, and alleging that, on the contrary, the City, under the circumstances, was obligated to renew, and had renewed, the contract for an additional period of twenty years, and that the Water Company preferred this alternative to a sale of its plant.

At the same time the Water Company filed its cross-bill, which, with its exhibits, appeared in the

printed record, beginning at page 111. To this cross-bill the City and County of Denver and certain of its officers, the persons named in section 264a as members of the Public Utilities Commission, and the New York Trust Company, complainant, were made defendants. It was in the nature of a bill to quiet its title to its street rights in and contract rights with the City and County of Denver; to have the nature thereof determined and declared by decree; to remove clouds therefrom, particularly the cloud created by said section 264a, and by the various claims and acts made and done thereunder; and to protect its property by injunction, both temporary and permanent, against unlawful acts which threatened to greatly injure, if not entirely destroy, it. This cross-bill is of the precise nature of, and was modeled upon, the bill which was approved as to form and held to state a cause of action in equity in the case of Blair vs. City of Chicago, 201 U. S., 400, 449. See also Detroit vs. Detroit Citizens R. Co., 184 U. S., 368, 378; Cleveland vs. City R. Co., 194 U. S., 517, 531; Water Works Co. vs. Vicksburg, 185 U. S., 65, 82.

To this cross-bill the New York Trust Company was a necessary party defendant, because as against it the cross-complainant sought a determination that under the existing contract the Water Company was authorized and empowered to continue to supply water to the City of Denver and its inhabitants for an additional period of twenty years, under the conditions prescribed in Ordinance 44, contrary to the contention of the Trust Company to the effect that the Water Company was obligated to sell its plant to the City, and thus terminate the relation. And the City

and its officers, as well as the members of the Public Utilities Commission, were necessary and proper parties defendant, because other relief sought by the cross-bill was directed against them.

It is unnecessary at this point to repeat, or even paraphrase, the allegations of the cross-bill. It is sufficient to say that the cross-bill clearly and fully set forth the matters which have hereinbefore been stated in narrative form.

On September 1, 1910, the matter came on to be heard before the district judge, then holding the Circuit Court, upon application for a temporary injunction as prayed in the cross-bill (Printed Record, p. 240). The cross-bill, which was duly verified, was supported by affidavits; no answer was filed by the defendants, and no affidavits which in any important particular put in issue its allegations or the averments of the affidavits on behalf of the cross-complainant.

On September 6, 1910 (Printed Record, p. 272), the Circuit Court granted the motion for temporary injunction, and the temporary writ of injunction was thereupon issued, prohibiting the City and its officers, including the members of the Public Utilities Commission,

> "from issuing, or attempting to issue, the bonds, or any of the bonds, described and set forth in section 264a of the charter of the city and county of Denver and ordinance 98 of the series of 1910, for any purpose whatsoever, and from interfering, or attempting to interfere, with, or obstructing, or attempting to obstruct, the defendant The Denver

Union Water Company in the exercise and enjoyment of its contract and franchise rights under said ordinance 44 of the series of 1890 and 163 of the series of 1907, and otherwise, and from doing, or attempting to do, any act or thing tending to accomplish any such purposes, until the further order of the court in the premises."

From this decree an appeal was taken to the Circuit Court of Appeals for the Eighth Circuit, where the matter was very fully argued, before a court consisting of Circuit Judge Hook and District Judges Riner and Reed, with the result that the order of the lower court issuing said temporary injunction was in all things affirmed, the opinion being published in 187 Federal Reporter, page 890.

The opinion of the Circuit Court of Appeals was announced and its judgment entered on May 19, 1911 (Printed Record, pp. 347 and 348).

Meanwhile the issues had been made up in the lower court, all of the proofs had been taken, the case finally argued upon its merits and submitted to the trial court for its final decision. (See affidavit attached to brief opposing petition for certiorari.) While the case was under advisement by the trial court concerning the decree to be entered therein, and on the 13th day of May, 1912, application was made to this court for the writ of certiorari, upon which a review might be had of the decision of the Circuit Court of Appeals upon said appeal from the interlocutory order of injunction. This petition was granted and the writ issued on May 28, 1912.

By virtue of these proceedings, the matter is now before this court for review upon the record which the Circuit Court of Appeals considered and for a determination of the propriety of the order of that court affirming the issuance of said temporary injunction.

We submit that upon this record the overwhelming equities favor the complainant and cross-complainant below, respondents here, and are against the defendants below, petitioners here. The facts upon which these equities arise are undisputed and indisputable. The case discloses a manifest attempt upon the part of a municipal corporation, and certain of its officers and supposed representatives, to repudiate solemn agreements, to disregard obligations imposed by formal contracts, and ratified and confirmed by a long course of dealing, and to utterly destroy property now worth and representing an investment of more than fourteen millions of dollars, created upon the faith of this solemn compact and in the reasonable belief that a municipal corporation, like any other corporation or individual, was bound by its contracts, that it would in good faith carry them out, and that, at least, it would not deliberately and intentionally repudiate them.

As stated, there is no denial of the facts—there cannot be; the defenses interposed are technical in the extreme; they relate not so much to the nature of the contract and its terms, as understood by both parties, as to an alleged lack of power on the part of the City to enter into such a contract. These defenses involve not at all a denial of facts which would overwhelmingly estop an individual or an ordinary corpo-

ration, but rather an assertion that a municipal corporation may not under any circumstances be estopped, and that all maxims of equity and principles of ethics, morality and good conduct fail of application when a municipal corporation is involved. If the defendants in this cause, petitioners here, were engaged in the ordinary avocations of life; if the City of Denver were a business corporation, or engaged in business enterprises, there can be no doubt, we think, that its conduct would meet with merited rebuke, and its contentions with quick denial. Whether the fact that it is a municipal corporation changes the situation in this regard is the question to be considered.

The Water Company—and, we believe, likewise the Trust Company—have not contended in this proceeding that the City was prevented by contractual relations from erecting and operating a competing municipal plant. Although this statement has been repeatedly made by the Water Company at oral arguments and in the briefs which have been filed in the lower courts, nevertheless the City has continued to treat this point as an important, if not controlling, one. Pages are devoted to the argument of this subject, innumerable authorities are cited, and the conclusion is drawn that because the City had the unimpaired power of constructing a municipal plant, therefore the bill and cross-bill in this case were without equities, and the relief prayed for could not be granted.

As a premise—and a false one—to such a line of argument, the City assumes that the sole object and scope of section 264a of the charter was to provide for the construction and operation of an independent competing municipal plant.

As a matter of fact, the principal and inseparable portion of section 264a was directed toward the purchase of the property and plant of the Water Company in a manner and at a price entirely different from that provided for in Ordinance 44 of 1890, and which alone gave to the City the right of purchasing the plant. In quantity more than three-fifths of section 264a was devoted to this purpose, and it is impossible to make the claim that the subject-matter of section 264a was simply to provide a method and means for constructing a municipal plant.

So far, then, as section 264a attempted to purchase and acquire the property and plant of the Water Company, contrary to the express provisions of Ordinance 44 of 1890, and at a price of seven million dollars, in the face of an appraisement of fourteen million, four hundred thousand dollars, made strictly under the terms of Ordinance 44 of 1890, and in other particulars hereinafter fully discussed, it constituted an impairment of the obligation of the contract between the Water Company and the City. This being true, the Circuit Court of Appeals held that section 264a, as an entirety, was invalid, not because it attempted to provide for the construction of a municipal plant, but because it attempted to impair the obligation of Ordinance 44 of 1890 and to purchase this property at less than one-half of its appraised and contract value. But this is not the only objection to section 264a. From the beginning we have urged, and shall in this brief specifically point out, that section 264a is absolutely void, independent of any impairment of the obligation of a contract, because both in its form and in the method of its submission it is

counter to the Federal Constitution; to the Constitution of the State of Colorado; to the then existing charter provisions of the City and County of Denver, and to decisions of the Supreme Court of the State of Colorado upon a similar condition.

It may be conceded—and we have not and do not now contend otherwise—that the City retains, unimpaired, its power to construct a municipal water plant; but we do contend that, whether the contractual obligation under Ordinance 44 of 1890 is to purchase the plant or to continue the contractual relations after April 10, 1910, such obligations must not be impaired by the enactment of ordinances, and that when the City attempts to exercise its power of constructing a municipal plant, it must do so in a constitutional, legal and regular manner.

There would be here presented an altogether different question if the City had, pursuant to the constitutional and charter provisions, taken steps to provide for a municipal plant, and had not, in the same ordinance and at the same time, directly and positively impaired contractual obligations independent of the municipal power to erect a plant, and on top of this objection proceeded in a clearly unconstitutional and illegal manner.

Aside from the question of contractual rights, the Water Company contends that, being the owner of many millions of dollars' worth of property located in the City and County of Denver, and having a contract which in itself is property and which gives to it the right to do business in the City and County of Denver, it has the right to object to unconstitutional and illegal acts by the City of Denver which result in irreparable damage to it.

Counsel for the city assume, at repeated places in their present brief (Brief, pp. 5, 69-79, 114-118, 222), that all that is necessary for them to do is to demonstrate the right of the City to erect a competing plant, and that then they may ignore the fact that the major and principal portion of section 264a of the charter was not devoted to such an object, but to striking down contractual rights under Ordinance 44 of 1890, and that the City has proceeded in an unconstitutional and illegal manner.

All of these statements will be more extensively argued later in the brief and under appropriate heads, but we desire in the preliminary statement to remove, as far as possible, any unclearness of issues, and to have the court fully understand that the question as to whether the City still retains the power to erect a competing plant is not here involved either as an important or as a controlling issue.

I.

RIGHTS OF WATER COMPANY BASED UPON CONTRACT.

1. A Consideration of Certain General Principles.

We premise the discussion of this branch of our subject by reminding the court of the settled doctrine that a municipal corporation has two classes of powers—one, legislative and governmental; the other, proprietary and relating to its business functions; and that in the exercise of powers of the latter class it is governed by the same rules which govern the private individual or corporation.

In contracting for a water supply for itself and its inhabitants, a city is not exercising its governmental or legislative powers, but its business or proprietary powers. Such powers are plenary and unlimited, save by the duty to exercise them with reasonable discretion, or as they may be expressly limited by statute or charter. These general rules are laid down by the most eminent text-writer upon the subject.

> Dillon on Municipal Corporations (5th Ed.), secs. 109, 1303, p. 2134, note 3.

These distinctions have been noted by this court.

> Walla Walla vs. Walla Walla Water Co., 172 U. S., 1, 8, 9.

The doctrine has been repeatedly declared by the Circuit Court of Appeals for the Eighth Circuit.

> Illinois Trust and Savings Bank vs. City, 76 Fed., 271, 282.
>
> Pike's Peak Power Co. vs. City of Colorado Springs, 105 Fed., 1.
>
> Omaha Water Co. vs. City of Omaha, 147 Fed., 1, 5.
>
> Omaha Water Co. vs. City of Omaha, 162 Fed., 225.
>
> Tuttle vs. City of Cedar Rapids, 176 Fed., 86.

And it has been accepted to its fullest extent by adjudications of the highest court of the State of Colorado.

> Colorado Springs vs. Colorado City, 42 Colo., 75, 83.

Colorado Springs vs. Colorado & Southern Railway, 38 Colo., 112, 113.

Tramway Company vs. Londoner, 20 Colo., 150, 157.

We further premise this discussion by calling attention to the fact that every arrangement between a city and a private individual or corporation relative to the furnishing of a water supply for the municipality and its inhabitants involves, at the commencement of such relation, three distinct features. These are: (a) the grant by the city to the private individual or corporation of the right to lay, maintain and operate in the streets and public ways of the city the pipes and other apparatus for the distribution of water; (b) the contract with the municipality with reference to the furnishing of a supply for municipal purposes, the price to be paid therefor, and the other conditions thereof; (c) also, ordinarily, an agreement that the municipality will for a certain period of time refrain from exercising its power to regulate rates, and that during said period the rates to be charged private consumers shall not exceed a certain maximum fixed by the agreement.

Dillon on Municipal Corporations (5th Ed.), sec. 1304, p. 2145.

Vincennes vs. Citizens Gas Light Co., 132 Ind., 114.

Kaukauna Electric Light Co. vs. Kaukauna, 114 Wis., 327.

The street right, when granted, is a vested property right—an easement in the street. It has sometimes been said that because the power to make such

a grant in respect of public highways rests primarily in the state, therefore, when the municipality, as agent of the state, and by its authority, makes such grant, it acts in its public or governmental capacity. But, under recent decisions of this court and those of other courts which it has approved and adopted, it seems clear that such a grant is no different in legal effect from the conveyance of an easement by a private individual. Therefore it is proper to say that even in respect to this the municipality acts in its proprietary capacity.

> Detroit Citizens Street Railway Co. vs. City of Detroit, 64 Fed., 628, 635, 641, 643.
>
> People vs. O'Brien, 111 N. Y., 1.
>
> City of Louisville vs. Cumberland Tel. & Tel. Co., 224 U. S., 649, 661, 664.
>
> Detroit vs. Detroit Citizens Street Railway Co., 184 U. S., 368, 395.
>
> Minneapolis vs. Street Railway Co., 215 U. S., 417, 430.

But, however this may be, it is clearly beyond question that the grant of the street right is entirely distinct from the contract for service, and is equally distinct from the schedule of maximum rates. The street right is frequently granted, and often exists without any contract for service and without any provision as to rates to private consumers. This is always true in respect of commercial steam railroad and telegraph companies. It is true in many cases in respect of street railway companies. Such companies frequently hold contracts respecting the rate of fare

which may be charged; but, so far as we are aware, in none of such cases does there exist a contract in respect to furnishing service to the municipality. This also is usually the case in respect of telephone companies. It is only in the case of water companies and lighting companies that the company possesses, as a rule, not only the street right, but also the contract with the municipality for service, and the provision respecting a schedule of rates to be charged to private consumers. These illustrations serve to emphasize the distinction between the street easement and the contract, which may or may not be entered into from time to time between the municipality and the public-service corporation. The street right may, and often does, exist without the contract, and is wholly independent therefrom.

When a company possesses the legal right to be a corporation, and also the legal right to carry on the business for which it has been organized, and to charge therefor, whether that business be the sale of water, of light, of transportation or of telegraph or telephone service (all of which primary rights are, under the laws of Colorado, derived from the state by the act of incorporation); and when, in addition, such company possesses the easement in the streets of a municipality upon which to place, maintain and operate the apparatus used in the prosecution of the business which the state has authorized, it possesses every attribute essential to the conduct of such business. It may or may not have a contract with the municipality to furnish, for municipal purposes, water, light or transportation, free or at fixed prices. It may or may not have a contract with such munici-

pality which, for a period of time, precludes the exercise by the municipality, or other proper agency of government, of the power to regulate rates to be charged for a public service. Such contracts may never have existed in the particular instance; or, having existed, they may have terminated; or, having terminated, new ones may have been made, or they may have been changed from time to time. In any event, such contracts are non-essential to the carrying on of the business for which the company has been organized, and are equally non-essential to the conduct of that business in any locality within the state, whether within or without the confines of a particular municipality.

The distinctions thus pointed out are important to a correct decision of the instant case. We earnestly request the court to bear them in mind throughout the discussion which follows.

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2. *On December 16, 1870, the Easement in the Streets Was Granted. It Ever Since Has Been and Is Now a Vested Property Right. The Relation Then Begun Has Continued Without Interruption to the Present Day.*

On November 17, 1870, James Archer, engineer of the Denver City Water Works, conferred with the City Council of Denver relative to the advantages which the City and its citizens would derive from the immediate construction of waterworks therein; and the council appointed a committee of three to confer with The Denver Water Company. (Record, p. 191.)

On November 30, 1870, The Denver City Water Company was incorporated under the laws of the

Territory of Colorado (p. 180). James Archer was made the president of this company, and on December 5, 1870, its board of directors, by resolution, authorized the president to appoint a committee of four to confer with the City Council of Denver, and if possible, procure from the City "such grants, rights, privileges and rights of way through the streets of Denver and additions thereto as may in their judgment be most beneficial to the interests of this company." At the same meeting, and by a separate resolution, the directors authorized the president to execute "such contract as he may deem most beneficial to the interest of the company with the City of Denver for a supply of water, and for the right of way for pipes and other privileges in the streets of said city" (p. 236).

On December 8, 1870, there was submitted to the City Council a proposition from The Denver City Water Company, which was, with a certain modification, approved and accepted by the City, and the mayor authorized to sign a contract upon the basis thereof (p. 192).

On December 12, 1870, the contract drawn up pursuant to the acceptance of this proposition was submitted to the board of directors of the Water Company, and referred to in the minutes as a memorandum of an agreement between the Company and the City "for a supply of water, and for the right of way and privilege of laying water pipes in the streets of said City" (p. 237).

On December 16, 1870, the contract was executed by the City and the Water Company, and is set forth at pages 194 and 195 of the record; and on December

17, 1870, as appears from the minutes of the board of directors, the president of the Water Company reported to the board that "he has entered into and executed a contract with the City of Denver for a supply of water, and for the exclusive right of this Company to lay pipes for the distribution of water in the streets of Denver and the additions thereto," which act was ratified and confirmed (p. 237).

By this contract the City granted to the Water Company "the sole and exclusive right to lay pipes for the distribution of water within the city limits of said City of Denver, and any additions that may hereafter be made thereto." The Water Company on its part agreed to lay three miles of distributing pipe within the first year, to supply the same with water, and to extend the same thereafter as necessary; to erect hydrants to furnish water to the municipality for fire and other purposes, at a certain price; to furnish water for domestic consumption, at rates not to exceed those charged in the city of St. Louis. And it was further provided that at the expiration of twenty years the City might purchase the waterworks at a value to be arrived at by appraisement (pp. 194 and 195).

It will be noted that the agreement contains two elements: (1) the grant of street rights, which purports to be exclusive; (2) the contract for a water supply, both for municipal purposes and for private consumption. *It will also be noted that no limitation of time is placed upon the grant of street rights.* The City reserves the right to purchase at the expiration of twenty years from December 8, 1870; but the evident intention is that in case of failure to so purchase

the street rights shall be unaffected and the contract shall continue.

At the time of this transaction the City of Denver was authorized, through its council:

> "Sec. 8. To provide the City with water; to erect hydrants and pumps; build cisterns and dig wells in streets for the supply of engines and buckets; to provide for and regulate the manner of introducing water into the City for irrigating and other purposes, and to regulate and provide for constructing ditches, canals and gutters for conducting and distributing water through the city; and to regulate the use of water by the inhabitants of the city for irrigating the soil, and the seasons of the year when water shall be introduced, and the quantity of water in the several seasons.
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> * * * * * * * *
>
> Sec. 9. To open, alter, abolish, widen, extend, establish, grade, pave, or otherwise improve and keep in repair, streets, avenues, lanes and alleys, side-walks, drains and sewers." (Colo. Session Laws of 1866, p. 100.)

This was ample authority to justify the aforesaid grant.

> "Sec. 7. Every estate in lands which shall be granted, conveyed or devised to one, although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee-simple estate of inherit-

ance, if a less estate be not limited by express words, or do not appear to be granted, devised or conveyed by operation of law."

Revised Statutes of Colorado, 1868, p. 107; also 1908, sec. 675, p. 327.

Dillon on Municipal Corporations (5th Ed.), sec. 1212.

Detroit Citizens Street Railway Co. vs. City of Detroit, 64 Fed., 628, 635.

Atchison Street Railway Co. vs. Mo. Pac. Ry. Co., 31 Kan., 660; 3 Pac., 284, 288.

Whitsett vs. Union Depot and R. Co., 10 Colo., 243.

Colo. Central Co. vs. Mollandin, 4 Colo., 154.

Levis vs. City of Newton, 75 Fed., 884.

City of Newton vs. Levis, 79 Fed., 715.

Andrews vs. Pipe Co., 61 Fed., 782.

City vs. Union Pacific, 137 Fed., 869.

City vs. Cumberland Tel. & Tel. Co., 174 Fed., 739.

City vs. Bull, 106 Ill., 337.

Gregsten et al. vs. City of Chicago, 145 Ill., 451, 461.

Des Moines St. Railway Co. vs. Des Moines Broad-Gauge St. Railway Co., 73 Iowa, 513; 33 N. W., 610, 612, 614.

Brown vs. Duplessis, 14 La. Ann., 842.

Shreveport Traction Co. vs. Shreveport, 122 La., 1; 47 South., 40.

The Denver City Water Company accepted the grant of street rights. It also undertook the performance of the contract for service which was then entered into. It immediately began the construction of its distributing system in the streets and public ways of the City, and prior to May 9, 1874, had placed its pipes and mains in the streets of all inhabited portions of the City of Denver—was maintaining and operating the same therein, and fully complying with the provisions of the contract. (Printed Record, pp. 231 and 232.)

It wil be noted that the grant of street rights covered not only the City as it then existed, but any additions that might thereafter be made thereto. This was proper, effective and enforceable.

> Dillon on Municipal Corporations (5th Ed.), sec. 1304, p. 2143.
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> Seattle Co. vs. City of Seattle, 54 Wash., 9; 102 Pac., 767.
>
> People vs. Deehan, 153 N. Y., 528.
>
> Grand Rapids vs. Grand Rapids Hydraulic Co., 66 Mich., 606; 33 N. W., 749.

By the acceptance of this grant and the occupation thereunder, with pipes and distributing apparatus, of a substantial part of the streets covered thereby, the street right became a vested and irrevocable property right, not only in respect of the territory actually then occupied, but also in respect of all territory authorized to be occupied, including additions thereafter to be made to the city.

> Merc. Trust Co. vs. City of Denver, 161 Fed., 769, 773.

Southern Bell Co. vs. Mobile, 162 Fed., 523.

Chicago Co. vs. Town, 130 Ill., 42; 22 N. E., 617.

Indianapolis Cable Co. vs. Citizens Street Railway Co., 127 Ind., 369; 24 N. E., 1054; 26 N. E., 893; 8 L. R. A., 539.

People vs. O'Brien, 111 N. Y., 1; 2 L. R. A., 255, 260.

Elliot on Roads and Streets (2nd Ed.), sec. 752.

In *Mayor of Knoxville vs. Africa*, 77 Fed., 501, Mr. Justice Lurton, speaking for the Circuit Court of Appeals for the Sixth Circuit, said (p. 507):

> "A right of way upon a public street, whether granted by act of the legislature or ordinance of the city council, or in any other valid mode, is an easement, and as such is a property right, capable of assignment, sale, and mortgage, and entitled to all the constitutional protection afforded other property rights and contracts."

In *Detroit Citizens Street Railway Co. vs. City of Detroit*, 64 Fed., 628, the same judge, speaking for the same court, said (p. 641):

> "To the practical operation of a street railway three things were essential under the law of Michigan. These were:
>
> First, corporate capacity; this, because under the law of that state there seems to have been no provision by which natural per-

sons could properly acquire the other requisite franchises.

Second, a franchise to operate the road and take tolls.

Third, a right to occupy particular streets with the necessary tracks and equipment.

These three requisites are distinct and separable. The first two are essentially franchises which could only come from the State. The third, and equally essential requisite, could not come from the State, and, if acquired at all, must come from the municipality within which it was proposed to exercise its substantial franchises. * * * [p. 643] The power to consent is in and of itself a power to grant an easement. The 'consent' is an easement and the act of consenting to the use of the street for street-railway purposes is the act of granting an easement in the streets. Consent to such use of the streets constitutes a typical easement and the right granted thereby is an interest in realty, being an incorporeal hereditament."

A leading case upon this subject is *People vs. O'Brien,* 111 N. Y., 1, wherein, after full discussion, it is held that the grant of street rights may be in fee and in perpetuity, and is so unless by its terms it is limited or revocable, although the grantee be a corporation created for a limited period, and that no express grant of power to that effect is necessary to

enable the municipal corporation to grant a street right in fee and in perpetuity. See also *Miner vs. New York Central Railroad Co.*, 123 N. Y., 242; *People vs. Deehan*, 153 N. Y., 528.

The foregoing cases are approved and the doctrine which they announce is adopted by the Supreme Court of the United States.

> Detroit vs. Detroit Citizens Street Railway Company, 184 U. S., 368, 395,
>
> Minneapolis vs. Street Railway Co., 215 U. S., 417, 430.

The New York decisions and the doctrines which they announce have received the express approval of Judge Dillon in the latest text of his valuable work.

> Dillon on Municipal Corporations (5th Ed.), sec. 1265, pp. 2050, 2054.

And this court, in the recent case of *City of Louisville vs. Cumberland Tel. & Tel. Co.*, 224 U. S., 649, speaking through his Honor, Mr. Justice Lamar, says (p. 661):

> "Such a street franchise has been called by various names—an incorporeal hereditament, an interest in land, an easement, a right of way. But howsoever designated, it is property."

And again, on page 664, after citing with approval the New York cases, and the other cases cited by Judge Dillon, this court says:

> "The earlier cases are reviewed in Detroit Street R. R. vs. Detroit, 64 Fed. Rep.

628, 634, which was cited with approval in Detroit vs. Detroit Street R. R., 184 U. S. 368, 395. This court there saying: 'Where the grant to a corporation of a franchise to construct and operate its road is not by its terms limited and revocable, the grant is in fee.' "

The authorities hereinbefore cited conclusively determine: first, that the municipality, as the agent of the state, has power to grant an easement in its streets in fee and in perpetuity, unless in the delegation of the power it is otherwise expressly limited; second, that when such grant is made, it is a grant in fee and in perpetuity, unless by its express terms it is limited or made revocable.

We are not unmindful of the recent decision of the Circuit Court of Appeals in Omaha Electric Light Co. vs. Omaha, 179 Fed., 455. We submit that it is in conflict with the still more recent decision of this court in Louisville vs. Cumberland Telephone Co., 224 U. S., 649. But, at any rate, the sole effect of that decision, after construing the applicable statutes and charter provisions, was to determine that, after all, the question was one of intent, and under the circumstances of that case it was concluded that it could not have been the intent of the city to grant a street right which should continue to be irrevocable after the expiration of the corporate life of the grantee, the court saying (p. 460):

"We think the facts of this case, in the light of the foregoing authorities, disclose the intention that the company should have

> and enjoy the franchise in question, at least for the period of its corporate existence, and that its assigns or successors might thereafter hold and enjoy the same at the will of the City only."

In the case at bar the grant was to a Colorado corporation, incorporated on November 30, 1870, and having a corporate life of twenty years, which expired on November 30, 1890. It is clear that it was not the intention of the City Council that the street rights granted in 1870 should be limited to the term of the corporate life; for on May 9, 1874, the City of Denver entered into a subsequent contract with this corporation relative to a municipal water supply, covering a period of seventeen years from its date, and requiring the Company to furnish said water supply at the rates specified, until May 1, 1891—a period extending beyond the corporate life of the Company, as will be observed. (Printed Record, p. 207.) This contract we shall presently discuss in more detail. Moreover, by Ordinance No. 44 of the Series of 1890, the City of Denver, through its council, recognized the street rights as perpetual, and confirmed the same, as we shall presently show.

It cannot be found that the rights conferred by the contract of 1874 were not assignable, and therefore were intended to be limited to the corporate life of the grantee; for by said Ordinance No. 44 of the Series of 1890 the street rights were expressly recognized and confirmed in an assignee of the original grantee, and said assignee required to fulfill the terms of the contract for a water supply throughout the entire period ending with May 1, 1891. (Ordinance

No. 44, sections 8, 10, 19 and 20; Printed Record, pp. 150, 153, 154.)

Louisville vs. Cumberland Tel. Co., 224 U. S., 649, 662.

Colorado Springs vs. Colorado & Southern Ry. Co., 38 Colo., 113.

City vs. Bartholemew (C. C. A., 5th Cir.), 107 Fed., 349, 354.

We are, therefore, authorized to conclude that by the ordinance of December 16, 1870, The Denver City Water Company was vested with the right to lay, maintain and operate its distributing system in the streets of the City of Denver as it then existed, and as it might thereafter be enlarged by additions; that such right was unlimited in point of time; that by acceptance and construction thereunder by the Water Company it had become irrevocable; that it was not limited to the corporate life of the grantee, and that it was assignable and passed to its corporate successors.

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3. Contract of May 9, 1874.

Prior to the date mentioned above, dissatisfaction existed with the charges made by the Water Company and authorized by the contract of December 16, 1870, for the water supplied for municipal purposes. On January 6, 1872, the Water Company appointed a committee to confer with the City Council upon this subject, with power to make a contract (p. 236); and on February 2, 1872, proposed to the City to make a discount from the hydrant rentals

fixed by the previous contract, the same to be in effect for the term of two years (p. 199), which resulted in an agreement dated February 6, 1872, running for a period of two years from that date, and providing for such reduction in the hydrant rentals (Printed Record, pp. 201, 237). This contract expired on February 6, 1874; and on March 2, 1874, the Water Company, in view of such expiration, appointed a committee "to confer with the Mayor and the City Council of the City of Denver," and "to enter into a new contract for a supply of water for fire extinguishment and other purposes" (p. 238). And on April 13, 1874, the City Council appointed a committee to wait upon the Water Company and "ascertain what proposition they have to offer for furnishing water for the following year" (p. 203). On April 16, 1874, the chairman of the committee of the City Council, appointed "to see the officers of the Water Company and ascertain what proposition said Company might offer for the ensuing year," reported that the president of the Water Company was absent from the City, but that they expected to make a satisfactory arrangement when he returned (p. 203). On April 23, 1874, the committee of the City Council, "appointed to confer with the Water Company respecting the supply of water for the ensuing year," stated that they had not yet had an opportunity of holding a conference with the Company (p. 204). On April 30, 1874, the committee of the council reported that they had seen the president of the Water Company and offered $15,000 a year for five years in payment for water for fire purposes, and had received from him a communication as follows:

> "Your proposition for water for fire purposes received. We cannot consider the same. We will furnish water for fire and other purposes as designated under the original contract to the City of Denver, under date of December, 1870; or we will at this time arbitrate and sell the works to the City, instead of waiting for the expiration of the twenty years."

Thereupon a resolution was adopted requiring the Water Company to make certain dispositions of hydrants, under the terms of said contract of December 16, 1870 (p. 205). The Water Company was criticised in the council for attempting to force upon the City a monopoly, and the city attorney, being called upon, expressed it as his opinion that the exclusive or monopolistic feature of the contract of 1870 was probably invalid (pp. 205, 206).

On May 7, 1874, the committee of the City Council, which had theretofore been appointed to arrange with the Water Company concerning the supply of water for fire and other municipal purposes, presented a "supplementary contract," which had been drawn by the Water Company, and this contract, with certain amendments made by the City, was approved on May 8, 1874, and the mayor authorized to sign the same (pp. 206-207). On said May 8, 1874, the committee of the Water Company, which had theretofore been appointed to confer with the City and "enter into a new contract for a supply of water for fire extinguishment and other purposes," reported to the board of directors that, after repeated conferences with the city officials, they had "agreed upon the basis

and details of a contract to be entered in by and between this company and the City of Denver for a supply of water for the extinguishment of fires and other purposes; said contract to date from May 1, 1874, and to continue and to be for the term of seventeen years from the date thereof;" and, on motion, the president was authorized to enter into "a contract with the City of Denver for a supply of water for the term of seventeen years from and after date of May first inst.," as recommended by the committee (p. 238). On said May 9 the contract was entered into, and is set forth in the record at pages 207-209. On the same day the president reported to his board of directors that he had executed the contract with the City "for a supply of water for fire and other purposes," and the board thereupon ratified and approved the contract made by the president with the City of Denver "for a supply of water for the term of seventeen years from and after May first, 1874" (p. 239).

By the charter of Denver then existing, the City was authorized, through its council—

> "Sixth. To open, alter, abolish, widen, extend, establish, grade, pave, or otherwise improve and keep in repair, streets, avenues, lanes and alleys, sidewalks, drains and sewers.
>
> * * * * * * * *
>
> Fifty-ninth. To provide the city with water; to erect hydrants and pumps; to construct cisterns; to provide for and regulate the manner of introducing water for irrigation and other purposes; to regulate and provide for the constructing of ditches, ca-

nals and gutters for conducting and distributing water through the city, and to keep the same in repair; to regulate the use of water by the inhabitants of the city for irrigating the soil; to build and construct ditches outside of the city limits, for the purpose of bringing water into the city for the use of the inhabitants thereof, in such way and manner as shall by the City Council be deemed for the best interests of the city, and to keep the same in repair; to bore artesian wells for the purpose of obtaining water for the city, at such places within or without the City of Denver as may be procured for the purpose by the City Council; to construct or purchase water works for the use of the city, and to enlarge their capacity from time to time, and keep the same in repair; and generally, to do whatever may be needful and necessary to be done in order to supply the City of Denver with water for fire, irrigation and other purposes, and to regulate the same." (Colorado Session Laws, 1874, pp. 264 and 270.)

It is evident that the City had the broadest possible powers in reference to the subject under consideration. The contract which was made on May 9, 1874, appears in the printed record at pages 373-375. From the negotiations which preceded it, and which have been set forth above, it is evident that it was not intended to relate to any matters except the charges for the water supplied for municipal purposes, and possibly the provision of the former con-

tract, which purported to confer upon the Company an absolute monopoly.

The streets were already occupied with the mains and pipes of the Water Company, laid under the authority of the previous grant of street rights. Prior to December 5, 1874, the Company had laid more than fourteen miles of mains (p. 239), a large part of which had been laid prior to May 9, 1874 (p. 232). There had never been any complaint or criticism on the part of the City concerning the duration or extent of the street rights. The sole criticism had been directed to the charges for municipal water, and to the feature of monopoly.

The arrangement of December 16, 1870, had during the negotiations which preceded it been referred to by the parties as a grant of "rights, privileges and rights of way through the streets," as well as "a contract for a supply of water" (p. 236); whereas, in all the negotiations leading up to the contract of May 9, 1874, the same was referred to as a "contract for a supply of water for fire extinguishment and other purposes" (p. 238); an arrangement by the City with the Company "for furnishing water for the following year" (p. 203); "respecting the supply of water for the ensuing year" (p. 204); "$15,000 per year for five years to said Company for water for fire purposes" (p. 204); and when the contract was finally prepared, the City Council referred to it as "a supplementary contract" (p. 206).

Bearing these circumstances in mind, and not forgetting that the Water Company at that time already possessed a vested and irrevocable right to lay and maintain its pipes in all the streets of the City of Denver and additions thereto, let us examine the

terms of the contract. It is there provided that the City grants to the Water Company—

> "the sole and exclusive right to lay pipes for the distribution of water within the city limits of the said City of Denver, and any additions that may hereafter be made thereto, for the period of seventeen years from the date of this agreement; and in consideration of said grant, and other considerations hereinafter mentioned, the said party of the second part hereby covenants and agrees to and with the said party of the first part to lay each and every year during the continuance of this agreement, in and along the streets of the said City of Denver, one and one-half miles of main distributing pipes, in addition to the pipes now in use in the said city."

By this language the existence of the pipes already laid in the streets is recognized, and nothing whatever is said regarding the period of time during which either the pipes already laid or those which should thereafter be laid might be maintained in the streets. The language is confined to conferring "the sole and the exclusive right to lay pipes," and this exclusive right to lay pipes is limited to seventeen years; but it is nowhere said nor intimated that the right to maintain and operate pipes already laid shall be limited to that period; nor is it anywhere intimated that the Company shall be deprived of the right to lay additional pipes after the expiration of said period of seventeen years, in accordance with the authority

previously granted, although it is plainly stated that the exclusive character of such right shall terminate at the end of seventeen years.

The remaining portions of the writing relate to the contract for water supply. A change is made in respect to the payments by the City for hydrant rentals, but no change is made in respect to the charges for water furnished to private consumers. The City agrees to pay $20,000 per annum for the water received by it from the hydrants during a period of seventeen years; and it is provided that the City may purchase the plant at the expiration of five, ten or seventeen years from the date of the contract. What the result will be in case the City does not purchase within the seventeen-year period is not stated. But it is nowhere said that the street rights, or any rights of the Water Company, other than its contract with the City for a municipal supply, shall terminate at the end of that time. The contract concludes as follows (p. 209):

> "And it is further agreed that all contracts heretofore entered into between the parties to these presents are hereby absolutely annulled and held for naught."

If there were nothing more, it might be plausibly contended that this language indicated an intention to displace the street rights of the Water Company theretofore vested; but the obvious answer would be that under the authorities hereinbefore cited the street right is an easement or property right, and not a contract, and therefore the contracts evidently referred to are the previous contracts in reference to a

water supply. But the clause in question proceeds as follows:

> "And that if the party of the second part shall fail to perform either or every of the acts incumbent on him by these presents, and at the time and in the manner herein specified, then this and all previous contracts between the parties to these presents shall be void."

Clearly, this indicates that, in the minds of the makers of the instrument, rights still existed under previous arrangements with the City, notwithstanding the broad language of the earlier portion of the paragraph. Certainly, those rights were not connected with any previous contract for a water supply, either to the City or to private consumers; for the contract of 1854 was clearly a substitute for all such. Therefore the other rights must have been the street rights; and it is here provided in effect that the street rights embraced in the grant of 1870 are subject to forfeiture in case the contract of 1854 is violated, otherwise to remain in full force and effect.

Our contention, therefore, is that the contract of 1854 did not in any manner limit or affect, or purport to limit or affect, the street rights theretofore granted, except perhaps to make them subject to forfeiture in case of violation of the terms of the contract; otherwise they remained in all particulars effective as originally granted. The purpose, and the sole purpose, of the contract of 1870 was to limit the time to seventeen years, during which the right to lay pipes should be exclusive; to reduce the charges which

the Water Company might collect from the City for the water furnished through the hydrants, and to afford the City several opportunities, at shorter intervals than before, to purchase the plant. Certainly it was not, and could not have been, the purpose to limit the Water Company's easements in the streets to a period of seventeen years. These street rights were vested property rights. There is nothing in the surrounding circumstances or in the language of the contract to indicate that it was the purpose of the Water Company to surrender them, or of the City to take them away.

By an elementary canon of construction we are advised that that construction of a statute, an ordinance, a deed or a contract is always to be preferred which does not divest rights already vested.

Our contention is supported by the uniform construction which the courts have given to similar municipal acts. In Des Moines Railway Co. vs. City of Des Moines, 151 Fed., 854, the court was considering a city ordinance, which granted to the street railway company authority to lay and maintain tracks in the streets "in the manner and for the time and upon the conditions hereinafter mentioned and prescribed," and which, by a later section, containing the only reference to duration, provided "the right herein granted to said Company to operate said railway shall be exclusive, for the term of thirty years from the time the first mile of said track is laid and cars running thereon." It was contended that the right of the street railway company to maintain its tracks in the streets expired at the end of the thirty-year period; but the court said (p. 862):

"'And for the time' calls for construction. Many cases of the highest authority are called to my attention to emphasize the undoubted and most familiar rule that a public grant must be given the construction most favorable to the public, when it is susceptible of two or more constructions. But neither statutes nor ordinances are to be frittered away by construction. Like contracts, they are to be held up by the four corners, examined, and given a fair construction. Let it be kept in mind that for what appeared sufficient reasons the Legislature has from time to time limited the time of several municipal utility corporations and their rights to the streets. But not so with street railway lines. And let it be kept in mind that to prevent the ordinance from being void by creating a perpetual monopoly, that the monopoly feature was limited to thirty years of time, now expired. So that it seems to me, and clearly so, the words 'and for the time,' in section 1, refer to the monopoly feature of section 10. And section 10 creates the monopoly and has reference only to the monopoly. It grants a monopoly absolutely, but limits it to thirty years. But for the monopoly feature it was not inserted, and in my opinion it is wholly without reason as to any other feature of the situation. There is no grant of power, right, nor authority of any kind in section 10, except the grant of a monopoly, and that limited to a definite time.

Such was the construction placed upon it by eminent and impartial lawyers wholly without interest in early days of the life of this plant, on which money was advanced for the extension of the lines for the use of people desiring homes distant from the business district, and was the construction placed thereon by the law department of the City in litigation. The construction thus given was in effect that section 10 was not a grant, except for the monopoly for thirty years. And this being so, the words 'and for the time,' in section 1, are easily understood as referring to the right to use the streets to the exclusion of all other companies for thirty years, and thereafter in competition with other companies."

The final decree was reversed upon another ground (214 U. S., 170); but the construction placed upon the ordinance received the tacit approval of the Supreme Court.

But in the case at bar, as noted, the time limitation refers to the exclusive right "to lay pipes," and has no reference to the right to maintain and operate the same after they are laid, exclusive or otherwise. Therefore the facts in the case just cited bear more strongly against the construction given by the court than do those in the case at bar against the construction contended for by the Water Company.

In the case of Farmers' Loan and Trust Co. vs. City of Sioux Falls, 131 Fed., 890, which was tried at circuit before their Honors, Judges Sanborn and

Carland, the court was considering an ordinance or contract whereby the city had granted to the water company's predecessor "the exclusive privilege of laying water pipes for public use, beneath the surface of the highways of said City;" and it further provided that the contract "shall continue in full force and effect for and during the period of twenty years from April 9, 1884" (p. 893).

At the time with reference to which the court was speaking the twenty-year period had expired, but the court, speaking through Judge Carland, said (p. 898):

> "In the view of this case, which the court has been compelled to adopt, it is unnecessary to consider or decide whether or not the privilege to lay and operate the water mains granted to Kuhn and his assigns continues after the expiration of the twenty years specified in the contract, because the City has neither taken nor threatened any action inconsistent with this continuance. When, if ever, it attempts to prevent the exercise of this privilege, it will be time enough to consider its duration."

From which it is evident that the right continued after the expiration of the twenty-year period, but whether or not it is subject to revocation, the court does not decide.

But in the case at bar the City has itself, by subsequent legislation, recognized the continuance of the street right, after the expiration of the exclusive

contract, and treated it as perpetual and irrevocable. We refer to Ordinance No. 44 of the Series of 1890.

By sections 8 and 10 of this ordinance (pp. 150 and 151), the contract of May 9, 1874, with reference to the supply of water through hydrants, is recognized, and The Denver Water Company, successor to The Denver City Water Company, is required to carry out and fulfill the same to the end of the seventeen-year period; to-wit, May 1, 1891.

By section 19 of this ordinance (p. 153) it is provided:

> "And it is expressly understood that by the acceptance of this ordinance the said The Denver Water Company loses no rights in regard to the occupation of the streets, alleys and public places, or as to the rights of any other person or persons thereto, which it now possesses; but the same are hereby recognized and confirmed, and are to be deemed independent of and not merged in any grant in this ordinance elsewhere contained."

But the street rights in the City of Denver, possessed by The Denver Water Company, were those granted to The Denver City Water Company on December 16, 1870.

And, again, by section 20 of Ordinance No. 44 of the Series of 1890, it is provided (pp. 153, 154) that the mains, pipes, valves, hydrants and other apparatus then laid or thereafter to be laid in the streets, alleys or other public places within said City—

> "shall be and remain the sole and absolute property of said The Denver Water Com-

pany, its successors and assigns; and the said The Denver Water Company, its successors or assigns, *shall forever be considered and entitled to be in possession thereof, except in case of purchase by said City under the terms of this ordinance, or some agreement between said City and said Company, its successors or assigns.*"

Thus clearly recognizing the street rights confirmed by the previous section, and granted by the ordinance of 1870, to be irrevocable, except in case of purchase or agreement.

Upon what has gone before, we submit that from and after the date of the ordinance of December 16, 1870, and by virtue thereof, The Denver City Water Company and its successors had a vested right to lay, maintain and operate pipes, mains and apparatus for the distribution of water in the streets, alleys and public places of Denver and all additions thereto; that such right was not limited by the corporate life of the original grantee, nor by the period of seventeen years mentioned in the contract of 1874, but was unlimited in its duration. Even if, for the purpose of argument only, we should take that view of the situation most unfavorable to the contentions of the Water Company, the result would be that prior to the expiration of the seventeen-year period mentioned in the contract of May 9, 1874, the street right was irrevocable, but might have been revoked thereafter, except for the express agreement contained in Ordinance No. 44 of the Series of 1890, to the effect that it should never be revoked unless and until the City should purchase the plant. This is the extreme limit to which the

doctrine announced in Omaha Electric Light Co. vs. City of Omaha (179 Fed., 455, 460), applied to the facts of this case, viewed in their most unfavorable light, could possibly carry us. And we deny the applicability of that doctrine.

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4. Ordinance 44, Series of 1890.

In order of time, the next contract in the series is that designated by the foregoing headline.

The ordinance evidencing the contract was enacted by the City Council and approved on April 10, 1890, and is attached to the cross-bill as Exhibit A (pp. 146-157). As this contract constitutes an important element in the present controversy, it is to be given careful consideration.

(a) Circumstances and Conditions Which Preceded, Surrounded and Induced the Making of the Contract.

We are advised by the highest authority that—

> "There can be no doubt whatever of the general proposition that in the interpretation of any clause of a contract, the court is not only at liberty, but required, to examine the entire contract, and may also consider the relations of the parties, their connection with the subject-matter of the contract, and the circumstances under which it was signed."
>
> C. R. I. & P. Ry. Co. vs. Denver & Rio Grande, 143 U. S., 596, 609.

In Rockefeller vs. Merritt, 76 Fed., 909, the Circuit Court of Appeals, speaking through his Honor, Judge Sanborn, said:

> "One of the most satisfactory tests to ascertain the true meaning of a contract is made by putting ourselves in the place of the contracting parties when it was made and then considering, in view of all the facts and circumstances surrounding them at the time of its execution, what the parties intended by the terms of their agreement. When their intention is thus made clear, it must prevail in the interpretation of the instrument, regardless of inapt expressions or careless recitals."

To the same effect:

Winona & St. Peter Co. vs. Minnesota, 159 U. S., 526, 531.

Union Pacific vs. C. R. I. & P. Ry. Co., 163 U. S., 564, 582.

United States vs. Utah etc. Stage Co., 199 U. S., 414, 423.

United States vs. Gibbons, 109 U. S., 200, 201.

Accumulator Co. vs. Dubuque St. Ry. Co., 64 Fed., 70.

Cook vs. Foley, 152 Fed., 41, at 49.

In United States vs. Gibbons, *supra*, and in United States vs. Utah etc. Stage Co., *supra*, the doctrine was applied as against the United States. Applying this rule to the facts shown by the record, what was the

situation of the parties at the time this contract was made? The original Denver City Water Company was succeeded in the year 1882 by The Denver Water Company, which then acquired all of the property of the precedent company, including all of its rights under the previous ordinances of and contracts with the City of Denver. (Robinson's affidavit, p. 181.)

Prior to 1890 the Denver City Water Company and its successor, The Denver Water Company, had continually maintained, operated, enlarged and extended the system of water pipes in the streets of the City of Denver, pursuant to the previous ordinances, and had in all particulars complied with the contracts of 1870 and 1874. (Affidavit of Moffat, pp. 231, 232.)

Prior to April 10, 1890, the system had been so enlarged that on the date last mentioned it constituted nearly one hundred miles of mains, covered all of the City of Denver as it then existed, including not only what is known as the congressional grant, but also all of the streets in every portion of the City of Denver which were inhabited and required water service, including all of North Denver, all of West Denver, and a large area lying easterly of said congressional grant, and extending nearly to the present City Park of Denver, in addition to the congressional grant itself. (See affidavit of Thomas, p. 233, and the map attached thereto, p. 235.) The Denver Water Company, as successor to The Denver City Water Company, was in possession of this plant, utilizing the same to furnish water to the municipality and its inhabitants, in pursuance of the previous contracts. By virtue of what had occurred in 1870, as hereinbefore set forth, the Water Company was the

owner of a street right or easement, irrevocable in character and of unlimited duration. To take the worst possible view of the situation, and one which we think wholly unwarranted under the facts and the law as announced by this court, it was vested with a street right, certainly irrevocable prior to May 1, 1891, and continuing thereafter, but possibly subject to revocation. The Water Company was likewise the owner of a contract between its predecessor and the City, covering the furnishing of water for municipal purposes, and obligating the City to pay therefor at certain rates, and also covering the furnishing of water to private consumers, and fixing the maximum charges to be made therefor. This contract did not expire until May 1, 1891.

It is stated in the affidavit of Mr. Robinson, and wholly undenied:

> "That on April 10, 1890, and for a considerable period previous thereto, considerable apprehension existed in the City of Denver concerning the obtaining of an adequate supply of water; that said City was then and for some time had been rapidly growing; that previous to that time the Water Companies engaged in supplying water to said City and its inhabitants had been obtaining the same by direct supply from the streams in the vicinity of said City; that owing to the scarcity of water in said streams at certain seasons of the year, there had from time to time been a scarcity or threatened scarcity of water for the supply of said City and its inhabitants; that as a

result said City and its inhabitants were deeply concerned in reference to the matter, and it was evident that if the City continued to grow as it promised to do, some provision must be made to supply in an adequate manner the increasing needs of said City and its inhabitants for water, which could be done only by the construction of an adequate system of storage reservoirs, large enough for the needs of the City and its inhabitants, not only in the immediate present, but also in the reasonably near future; and it was recognized that such works could be provided, the necessary water rights therefor obtained and conduits therefrom to the distributing system in said City and outlying towns constructed only at very large cost, to wit: an investment of capital very much greater than any which theretofore had been made in the plant or plants provided at that time for the supply of water; that these conditions existed on said April 10, 1890, and in the light of those conditons said Ordinance No. 44 of the Series of 1890 was enacted." (P. 188.)

To repeat, the existing Water Company had a very extensive distributing system in the streets of Denver, adequate to the needs of the City, and installed at great expense; it had the right to maintain and operate this system in the streets of the City, without interference, certainly until May 1, 1891, and, as we contend, without limitation in point

of time; it had a valid and enforcible contract with the City, extending to May 1, 1891. The City was confronted with the necessity of an additional investment of capital, many times greater than had before been made, for the purpose of providing for its future needs in respect of a water supply, and was then unable or unwilling to itself furnish the necessary funds; and it was therefore necessary for the City to induce the investment of private capital, in very large sums, by offering such advantageous terms, and surrounding the investment with such safeguards, as would cause the owners of the capital to supply the necessary funds.

Moreover, the situation required the creation of permanent structures, useful for no purpose except to assure a supply of water to the City and its inhabitants for all future time, and clearly not intended to be limited in this use to a period of twenty years. These included Lake Cheesman, an immense reservoir in the mountains, having a capacity of nearly twenty-six billion gallons, which was created by the construction, at great expense, of the largest masonry dam in the world, enormous conduits to conduct the water so impounded to Denver, as well as large additions to the distributing plant itself.

It could not have been the intention of the parties that rates should be charged for the ensuing period of twenty years which would reimburse the investors. In fact, this was rendered impossible by the specification of maximum rates contained in Schedule A. But, as a practical matter, it would have been equally impossible without the schedule limitation.

It could not have been in contemplation of the parties that, at the expiration of twenty years, in case the City did not purchase the plant, these structures should no longer be used for the purpose for which they were designed, and therefore would become of no value for any purpose. It must have been, and was, within the contemplation of the parties to make some provision for the safeguarding of the invited investment, in case at the expiration of the twenty-year period the City should not wish to purchase the plant. Under these circumstances it is reasonable to expect that such provision be made, and if, upon a fair construction of the terms of the instrument, stipulations are found, or an understanding is evident, which cover that contingency, the court should find no difficulty in enforcing them, particularly when both parties have from the beginning so understood the agreement.

As was said by the Circuit Court of Appeals in the opinion in the instant case (187 Fed., 894, 895):

> "When a water company assumes the duty of supplying a rapidly growing city and its inhabitants with water for a period of twenty years, necessarily involving the expenditure of large sums of money, it is but natural that some consideration would be given by the parties to the status of the company and its property at the end of the period. A business of that character could not be conducted from hand to mouth, like that of a green grocer, but provision for the public needs must be made many years in advance of the actual demand, at least for an adequate water supply. There must be

a large investment against future requirements. Especially is this so in a country like that in which Denver is situated, where the problem is generally a difficult and expensive one. * * * Much of the investment made under such conditions naturally remains unreturned at the end of the franchise period. It would be a grievous burden upon the inhabitants of a city if a water company exacted such rates as would yield a reasonable return and, in addition thereto, such part of the investment as at the end of the franchise term would reduce it to the value of an idle plant. No community would tolerate such charges, and in practice they are rarely, if ever, made. As was said by a hydraulic engineer selected by the city as an appraiser of the property in question, 'to make a structure like Cheesman Lake pay out in twenty years is unjust to the present generation of water takers.' (Printed Record, page 960.) The lake referred to is a reservoir of a capacity of nearly twenty-six billion gallons, which, though owned by the subsidiary company, is a part of the system of the water company. It is natural therefore to look for some treatment of the subject in the ordinance under consideration, and the parties point to sections 11, 12, 20 and 21."

In Louisville vs. Cumberland Telephone Co., 224 U. S., 649, at 663, the same thought is expressed, as follows:

> "In considering the duration of such a franchise it is necessary to consider that a telephone system cannot be operated without the use of poles, conduits, wires and fixtures. These structures are permanent in their nature and require a large investment for their erection and construction. To say that the right to maintain these appliances was only a license, which could be revoked at will, would operate to nullify the charter itself, and thus defeat the state's purpose to secure a telephone system for public use. For manifestly no one would have been willing to incur the heavy expense of installing these necessary and costly fixtures if they were removable at will of the city, and the utility and value of the entire plant be thereby destroyed. Such a construction of the charter cannot be supported either from a practical or technical standpoint."

It seems unnecessary to point out that the expense of providing the plant to furnish the City of Denver and its inhabitants with water was relatively very much greater, and the structures necessary for that purpose very much more permanent in character, than those involved in the Louisville telephone case.

Bearing these circumstances and conditions in mind, we proceed to the examination of the language of the contract.

(*b*) *Provisions of the Contract Analyzed.*

The title of the ordinance is as follows:

"A BILL FOR AN ORDINANCE CONTINUING AND EXTENDING THE FRANCHISE AND PRIVILEGES OF THE DENVER WATER COMPANY, AND MAKING A CONTRACT WITH SAID COMPANY FOR THE SUPPLY OF WATER FOR PUBLIC AND PRIVATE PURPOSES."

This language is altogether consistent with the purposes of the ordinance, as indicated by the surrounding circumstances and conditions, and the occasion which led to its enactment. It recognizes the distinction heretofore pointed out between the street rights of the Water Company and the contract for water supply. The street rights are evidently referred to under the designation "the franchise and privileges," and these are to be "continued and extended." The other purpose of the ordinance is to "make a contract with said Company for the supply of water for public and private purposes," and, as we shall presently see, the new contract was not to take effect until May 1, 1891, the date of the expiration of the previous contract.

By the title of the ordinance, no new street right was to be conferred, but an existing right was to be continued.

By section 1 of the ordinance (p. 146)—

"the right and privilege of laying down, *continuing and maintaining* water pipes, valves,

> hydrants and apparatus for the conveyance and distribution of water in, upon, along and through the following streets, avenues, alleys and public places of the City of Denver and additions thereto, to wit * * * is hereby granted to The Denver Water Company, its successors and assigns, to such extent as the City may lawfully grant the same, *subject to be terminated in the manner hereinafter in this ordinance provided.*"

But this granted nothing, for the grantee already possessed these rights.

The words "continuing" and "maintaining" are unusual in such an ordinance. They have no place in an original grant of new street rights. They are indicative of the council's conviction that the Company already had street rights which, it was understood, should and would continue.

By section 2 of the ordinance (p. 149) the City is required to make additional and confirmatory grants, whenever requested, the same "to be subject to termination in the manner in this ordinance hereinafter specified."

By sections 4 and 5 (p. 149) the Water Company is required to furnish water to private consumers, at rates not greater than those then in effect, as evidenced by Schedule A attached to the ordinance.

By section 7 (p. 150) the Water Company purchases certain hydrants formerly owned by the City, paying therefor the sum of $25,000, and is required to make certain changes in existing hydrants and said certain additional hydrants.

By sections 8, 9 and 10 a contract is made between the Water Company and the City, requiring the Water Company to furnish, and the City to take and pay for, a supply of water for fire and other municipal purposes. The previous contract of May 9, 1874, is specifically recognized and confirmed.

By section 10 it is provided that until May 1, 1891 (the date of the expiration of the former contract), the City shall pay semi-annually the sum of money mentioned in said former contract, and (p. 289) "during the remainder of the period of twenty years from and after the date of the passage and approval of this ordinance, the said City shall pay" as follows: for the period of ten years from and after May 1, 1891, the sum of $35 per hydrant per annum, "and for the remaining period, *until the right of purchase shall accrue,* as mentioned in section 11 hereof, the sum of $25 per hydrant per annum."

By section 11 (p. 151) it is provided that "at the expiration of the period of twenty years from and after the date of the passage and approval of the ordinance, in case the City shall then elect so to do, the said works may be purchased by the said City; and in case the parties cannot agree, after such election, upon the price to be paid by the City for the water works of the said Company, its successors and assigns," then their cash value is to be determined by arbitration. And this is entirely in the power of the City to consummate, without action on the part of the Water Company, because if the Water Company fails to appoint its appraisers within a certain time, the City may appoint them, although no corresponding privilege is accorded to the Water Company. And the section concludes by setting forth that—

"upon the payment or tender of payment by said City, the said Company shall convey to said City all of its property, real or personal, easements, rights and privileges; and thereafter all franchises, rights and privileges which have been at any time theretofore granted said Company, its successors or assigns, and which it may then possess, shall cease and be at an end."

By section 12 (p. 151) it is provided that—

"at the expiration of the said period of twenty years the said City may, at its election, renew the contract hereby made by ordinance to that effect, for a like period of twenty years, but at a price for hydrant rental ten per cent less than that mentioned in Section 10 hereof for the period remaining, after the ten years after May 1, 1891, and for successive periods of twenty years, at the price last aforesaid, as often and as long as the City may choose. This section is conditioned, however, upon the full performance by the City of the provisions of Section 2 hereof."

By section 14 (p. 152) the Company is required "at all times during the existence of this contract, or any renewal thereof," "to furnish and supply to the City, free of charge, water for use in the City Hall and fire department houses, for flushing sewers and gutters, and for sprinkling purposes."

By section 19 (p. 153) it is provided that—

"this ordinance, when the same shall be in

writing accepted by the Denver Water Company, becomes a contract between the City of Denver and the said The Denver Water Company, its successors and assigns; and the same shall, as to every provision herein contained, as fully bind and inure to the benefit of the successors and assigns of the said The Denver Water Company as to the said Company. *And it is expressly understood that by the acceptance of this ordinance the said The Denver Water Company loses no rights in regard to the occupation of the streets, alleys and public places, or as to the rights of any other person or persons thereto, which it now possesses; but the same are hereby recognized and confirmed and are to be deemed independent of and not merged in any grant in this ordinance elsewhere contained.*"

And by section 20 (p. 153) it is provided that—

"all mains, pipes, valves and other apparatus now owned by said The Denver Water Company, and composing its plant, and all such mains, pipes, valves, hydrants and other apparatus as said The Denver Water Company, its successors or assigns, shall hereafter lay down or set in or upon any of the streets, alleys or other public places within said City, shall be and remain the sole and absolute property of said The Denver Water Company, its successors and assigns; *and said The Denver Water Company, its successors*

or assigns, shall forever be considered and entitled to be in possession thereof, except in case of purchase by said City under the terms of this ordinance, or some agreement between said City and said Company, its successors or assigns, when all rights, of whatsoever nature, of said Company, its successors or assigns, in and to the subject matter hereof, shall vest in said City."

It will be observed that this ordinance or contract contains no limitation in point of time. It is nowhere provided that it shall terminate at any particular date. It is provided that at the expration of the period of twenty years the City may (sec. 11) purchase the plant, or (sec. 12) "renew the contract hereby made, by ordinance to that effect, for a like period of twenty years." The "contract hereby made" is the entire contract made by all of the provisions of the ordinance, by the express language of section 19, to the effect that "this ordinance, when the same shall be in writing accepted by The Denver Water Company, becomes a contract between the City of Denver and the said The Denver Water Company, its successors and assigns." It follows that unless the contract is terminated at the end of twenty years, by purchase, the entire contract evidenced by the ordinance continues for another twenty years. This conclusion is emphasized by the provision of section 20, which, after declaring that the distributing system then or thereafter to be laid in the streets shall be and remain the property of the Water Company, its successors and assigns, declares that the Water Com-

pany, its successors and assigns, "shall forever be considered and entitled to be in possession thereof, except in case of purchase by said City under the terms of this ordinance, or some agreement between said City and said Company, its successors or assigns, when all rights, of whatsoever nature, of said Company, its successors or assigns, in and to the subject matter hereof, shall vest in said City;" and by the language with which section 11 concludes, to the effect that in case of purchase by the City "all franchises, rights and privileges which have been at any time theretofore granted said Company, its successors or assigns, and which it may then possess, shall cease and be at an end."

Clearly, if the Company shall be entitled forever to remain in possession of its distributing plant, that possession is to be maintained in the place where the distributing plant is situate; namely, in the streets of the city; and can be maintained in no manner and for no purpose except to put the plant to the uses for which it was designed; namely, of distributing and delivering water to the City and to private consumers.

We submit that the language of the contract is fairly subject to no other construction. The provisions of sections 11 and 12 were intended to offer to the City an alternative—a right of choice between two courses, which it might pursue, but one or the other of which it must take. Nothing in the language of the contract indicates that at the expiration of the period of twenty years the City might choose a third course, and, by failing to purchase and refusing to renew, utterly destroy the heavy investment of private capital which it had invited by the enactment of the ordi-

nance on April 10, 1890, and which had been made. On the contrary, the language of the ordinance excludes the existence of such third alternative.

By section 20 the Water Company should be entitled to use its distributing plant in the streets for the purpose of carrying on the business of supplying water "forever," or until the City should buy the property. When an obligation is imposed upon the Company, or a duty is to be performed, it is couched in language well fitting with the "forever" in section 20—unlimited as to time.

By section 3 the Water Company "shall at all times hold the City harmless," etc.

By section 4 the Water Company "shall at all times" furnish water from its mains to private consumers.

By section 6 the Water Company "shall at all times" furnish water of a certain standard of purity.

By section 8 the Water Company "shall at all times" supply the hydrants with a certain fire pressure.

By section 13 the Water Company "shall at all times, after the taking effect of this ordinance, whenever so ordered to do by ordinance duly passed, extend its mains," etc.

Considering the circumstances which preceded, surrounded and induced the making of the contract, it is not reasonable to suppose that the City could have obtained the enormous investment of private capital (amounting to many millions of dollars, as it afterwards turned out) which was necessary in order to accomplish the purpose which the City had in view; nor is it reasonable to suppose that the City then ex-

pected it could do so, if at the end of the comparatively short period of twenty years the Company might, at the will of the City, become an outcast, its property useless junk, and the enormous investment which had created it a total loss.

Contracts between water companies and municipalities, imposing an unconditional obligation upon the city to purchase the water company's plant at the end of the contract period, are by no means unusual, as the reported cases testify.

> National Water Works Co. vs. Kansas City (C. C. A., 8th Circ.), 62 Fed., 863.
>
> Los Angeles Water Co. vs. Los Angeles, 103 Fed., 711.

The contract here under consideration offered to the City the alternative of escaping this obligation by renewing the contract for an additional period of twenty years. To state the matter in another way, the privileges granted and the contract made by the ordinance now under consideration could be terminated at the expiration of the period of twenty years. But this was to be accomplished in one way only; namely, through the purchase by the City of the property constituting the waterworks plant. If such purchase were not effected, then the Water Company should be entitled to remain in possession of and operate the plant for an additonal period of twenty years, upon the same terms and conditions and under the same contract for the furnishing of water to the City and to private consumers as theretofore, except that the City should be entitled to a 10 per cent reduction upon hydrant rentals, provided it had com-

plied with the provisions of section 2, in reference to additional and confirmatory grants.

By section 11 the City might "elect" to purchase, and by the consummation of the purchase terminate all rights of the Water Company, including those conferred by Ordinance 44.

By the provisions of section 12 the City might, "at its election, renew the contract hereby made, by ordinance to that effect, for a like period of twenty years," and so avoid the necessity of purchasing. But the rights of the Water Company could be terminated by purchase alone and not otherwise; consequently, if the City failed to exercise its right to purchase, and so to terminate them, it was bound to take the other alternative evidenced by section 12, and recognize the renewal of the contract for the additional period of twenty years, at the same time receiving a 10 per cent reduction in hydrant rental for the additional period; but it was not entitled to this reduction in hydrant rental unless it had fully performed the provisions of section 2.

If we take up the contract by its four corners and examine all that is contained therein; if we consider it as an entirety (and we are required so to do by settled rules of construction); if we give weight to the circumstances under which it was signed, and the relations of the parties as they then existed, it is impossible to conclude that the writing was intended to have any meaning other than that which we have attributed to it. It is said that public grants are to be construed strictly against the grantee and in favor of the grantor; but it is also to be borne in mind, as the courts have frequently declared, that, in contract-

ing for a water supply for itself and its inhabitants, a city exercises its private or proprietary, and not its governmental, powers, and is subject to the same rules of ethics, morals and law as would control between private individuals. In determining the meaning of a contract so made, we are authorized—nay, required—to consider what reasonable business men would have done under like circumstances and conditions, and give to the language of the contract, if at all subject to that construction, a meaning consistent therewith.

As was said by Judge McPherson in Des Moines Railway Co. vs. City of Des Moines, 151 Fed., 854, at 862:

> "But neither statutes nor ordinances are to be frittered away by construction. Like contracts, they are to be held up by the four corners, examined, and given a fair construction."

And as was said by the Circuit Court of Appeals, speaking through Mr. Justice Brewer, in National Water Works Co. vs. Kansas City, 62 Fed., 853, at 863:

> "Much was said, too, about the rule of construction of public grants, that rule being that the grants are to be construed favorably to the public and unfavorably to the grantee. It is unnecessary to attempt to define the peculiar quality of the title held by the company; nor do we question the rule of construction of public grants; but all contracts involving property rights and obligations

> between municipalities and individuals must be presumed to be based upon and to recognize the ordinary laws of business transactions, and if any departure therefrom is contemplated, such departure must be clearly manifested."

In Los Angeles City Water Company vs. City of Los Angeles, 103 Fed., 711, is found the decision of the Circuit Court, which marked the close of the long litigation between the water company and the city. (See 88 Fed., 720; 177 U. S., 558.)

In the Los Angeles case the water company was operating under a contract with the city, in the nature of a lease, whereby the city demised its waterworks to the company for a period of thirty years, from July 20, 1868; whereby the water company was given the right, for said period of thirty years, to sell and distribute water for domestic purposes, and to supply the city with water for certain purposes and at certain prices, and was required to make certain extensions and improvements in the system; whereby the water company was required, at the expiration of the period of thirty years, to surrender to the city possession of the waterworks, with all extensions thereto; and whereby the city covenanted, at the expiration of said period, to pay for the improvements and extensions which the water company had made. After the expiration of said period of thirty years, the city had not yet paid for the extensions and improvements of the waterworks system, which had been practically rebuilt by the waterworks company. The waterworks company was still in possession thereof, and supplying water to the city and its inhabitants

through the same. Thereupon the city enacted an ordinance reducing its rates of charge below those permissible under the original contract. The court held that, notwithstanding the express provisions of the contract, to the effect that the water company should surrender possession of the waterworks at the expiration of thirty years, and to the effect that the rights and privileges thereby granted should continue for a period of thirty years, and no more; yet, inasmuch as the city had failed to pay for the extensions and improvements as it had covenanted to do, the water company was entitled to remain in possession thereof and operate the same, and that the contract continued. The court says (p. 733):

> "The case as now presented shows that, notwithstanding the expiration of the thirty-year period mentioned in the contract, the City has not paid or tendered to the complainant Company the value of the improvements made in, about and upon the water works, in pursuance of the contract, nor have the respective parties been able to agree upon the value of such improvements. * * * "
>
> (P. 734) "As has been said, it was settled by the Supreme Court of the state in the suit between the complainant and the City, that the Company is not bound to surrender the property in question until it has paid for the improvements; but it is entitled, until payment is made or tendered, to remain in the exclusive possession thereof, notwithstanding the expiration of the thirty-year period. This, of course, can only be

because the contract secures it in that right. [In the case at bar this right is expressly secured by section 20.]

* * * * * *

The complainant here being entitled to the exclusive possession and control of the property, as was explicitly adjudged in the former case between it and the City, and that, by virtue of the contract in question, what is it to do with it except to operate the works? And if it operates them, as the City itself insists that it is bound to do, under what possible terms and conditions does it do so, except those specified in the contract?"

* * * * * *

(P. 738): "The defendant city has it in its power to put an end to all of the rights and obligations arising under the contract, by paying or tendering to the complainant company the value of the improvements made in, about and upon the water works as therein provided for. It can do this at any moment that it is ready to make the payment, after the amount has been agreed upon or has been otherwise determined. Until it does so, or offers to do so, all of the covenants and provisions of the contract continue, including that prohibiting the city from establishing lower rates than those charged at the time of the execution of the contract."

In a similar case the Circuit Court of Appeals arrived at a like conclusion.

National Water Works Co. vs. Kansas City, 62 Fed., 853.

We submit, therefore, that, by the express terms of the contract here under consideration, the Water Company is entitled to remain in possession of its plant in the streets of the City of Denver, and to maintain and operate the same until such time as the City shall purchase; that the City's right to purchase can only be exercised at definite intervals of twenty years; and that, under the provisions of section 20 and section 12 of Oridnance 44, so long as the Company remains in possession of the plant and operates the same, the relations of the parties are in all respects governed, and their rights measured and controlled, by the provisions of the contract in respect to water supply, evidenced by said ordinance.

But it is said that the words employed in sections 11 and 12 of the ordinance are permissive and not mandatory; that the word "may" is used, and not the words "shall" or "must."

But, as has been said, "instances are very common where the word 'may' is used as a synonym for 'shall' or 'must.'"

Northwestern Ins. Co. vs. Keith, 77 Fed., 374, 375.

And the word is frequently so construed, not only in statutes and rules of court, but also in contracts and other like instruments.

Long Island Co. vs. Conklin, 32 Barb., 381, 384.

Snowhill vs. Snowhill, 23 N. J. Law, 447.

Moreover, the word "may" is properly used here as expressive of the alternative courses open to the City at the expiration of the twenty-year period. "Must" or "shall" would have been proper if the City had been obligated to purchase in any event, or obligated to renew in any event. But, under the present contract, if the City purchased, it need not renew; or, if it desired to renew, it need not purchase. Therefore, the language employed was eminently fitted to express the contract for which appellee contends, and which was clearly within the contemplation of the parties. Sections 11 and 12 are placed in the contract in immediate sequence. There is no magic and no particular importance in the fact that they are separately numbered. Suppose they had been contained in one paragraph and under the same number, the contract, after stating that the rights and privileges thereby conferred should continue until terminated as hereinafter provided, would have set forth that "at the expiration of the period of twenty years the City, at its election, may purchase, in which event all rights of the Company shall terminate and be vested in the City; or at the expiration of said period the City, at its election, may renew." In such event, could there be any possibility of doubt concerning the meaning of the language? And are not the words as written in the contract the precise equivalent of those which we have imagined above?

Similar provisions in leases, giving the option to the landlord, at the expiration of a fixed term, of purchasing the improvements which the tenant may make, and likewise giving the option to the landlord of renewing the term, all framed in permissive language only, are uniformly held to require the landlord

either to purchase or to renew, and to prohibit him from refusing to do one or the other.

Bullock vs. Grinstead, 95 Ky., 261; 24 S. W., 867.

Hopkins vs. Gilman, 22 Wis., 454.

King vs. Wilson, 98 Va., 259; 35 S. E., 727.

Upon the foregoing discussion, we submit that, considering the language of the contract alone, and especilly when we read it in the light of the circumstances and conditions which preceded, surrounded and induced its execution, there can be no doubt whatever that it was the intention of the parties, expressed in their agreement, that at the expiration of the twenty-year period the City must either purchase or allow the contract to continue, and that a failure to purchase at the time specified in the contract brought into operation the alternative obligation of the City to continue, and to recognize and effectuate the continuance of the contract for an additional period of twenty years.

(c) Contemporary Construction and Estoppel.

But if there had been any doubt whatever that the meaning of the contract evidenced by Ordinance 44 was such as we have set forth above, that doubt would be entirely removed by the practical construction placed upon the contract both by the City and the Water Company, contemporaneously with its execution and ever since, which construction agrees in every particular with that now contended for by this appellee, and has by operation of the doctrine of estoppel become fixed and irrevocable, and not sub-

ject to change by any such reversal of position as was attempted by the City in May, 1910.

In Cavazos vs. Trerino, 6 Wall., 773, at 785, this court said:

> "The practical interpretation which the parties by their conduct have given to a written instrument in cases like this is always admitted, and is entitled to weight. There is no better test of the intention of the instrument. None are less likely to be mistaken. There is no danger of too large an admission. Safer testimony can hardly be presented in relation to any transaction occurring in human affairs."

In Chicago vs. Sheldon, 9 Wall., 50, at 54, this court said:

> "In cases where the language used by the parties to the contract is indefinite or ambiguous, and hence of doubtful construction, the practical interpretation by the parties themselves is entitled to great, if not controlling, influence. The interest of each generally leads him to a construction most favorable to himself, and when the difference has become serious and beyond amicable adjustment, it can be settled only by the arbitrament of the law. But in an executory contract, and where its execution necessarily involves a practical construction, if the minds of both parties concur, there can be no great danger in the adoption of it by the court as the true one."

And in Insurance Co. vs. Dutcher, 95 U. S., 269, at 273, it was said:

> "The practical interpretation of an agreement by a party to it is always a consideration of great weight. *The construction of a contract is as much a part of it as anything else.* There is no surer way to find out what parties meant than to see what they have done. Self interest stimulates the mind to activity and sharpens its perspicacity. Parties in such cases often claim more, but rarely less, than they are entitled to. The probabilities are largely in the direction of the former." (Italics ours.)

This doctrine has been repeatedly applied.

Steinbach vs. Stewart, 11 Wall., 566, 576.

Paige vs. Banks, 13 Wall., 608, 616.

Topliff vs. Topliff, 122 U. S., 121, 131.

District of Columbia vs. Gallaher, 124 U. S., 505, 510.

Knox County vs. Bank, 147 U. S., 91, 99.

Constable vs. National Steamship Co., 154 U. S., 51, 95.

Huntting Elevator Co. vs. Bosworth, 179 U. S., 415, 435.

Lowrey vs. Territory of Hawaii, 206 U. S., 206, 218.

The same rule has been announced and applied by the Circuit Court of Appeals. In Long Lumber Co. vs. Stump, 86 Fed., 574, the court said (p. 578):

"There is no better established rule, or one more instinct with the spirit of equity, in the construction of contracts wanting in perspicuity or clearness of meaning, than to adopt that which the parties, by their course of dealing, placed upon it before any controversy arose between them. * * * Courts may use the actual construction put thereon by the conduct of the parties under the contract as a controlling circumstance to determine the construction which should be put upon the contract in enforcing the rights of the parties."

To the same effect:

Chicago, Great Western Co. vs. Northern Pacific, 101 Fed., 792.

Fitzgerald vs. First National Bank, 114 Fed., 474.

Manhattan Life Ins. Co. vs. Wright, 126 Fed., 82, 87.

Cook vs. Foley, 152 Fed., 41, 50.

In a number of the cases cited above the doctrine was applied as against a municipal corporation. In Chicago vs. Sheldon, *supra*, it was applied as against the City of Chicago with respect to the construction of an ordinance in the nature of a contract. In District of Columbia vs. Gallaher, *supra*, it was applied as against the District of Columbia. In Knox County vs. Bank, *supra*, it was applied as against the county; and in Lowrey vs. Territory of Hawaii, *supra*, it was applied as against the territory.

The doctrine and its application to a municipal corporation have been accepted, to its full extent, by the highest court of the State of Colorado.

> Colorado Springs vs. C. & S. Ry. Co., 38 Colo., 107, 112, 113.

In the case last cited the Supreme Court of Colorado applied the doctrine as against the city of Colorado Springs in respect of an ordinance granting a street right.

But it frequently occurs that, owing to the practical construction placed upon a contract by the parties thereto, and in reliance thereon, one of the parties has so changed his position, by the expenditure of money or otherwise, that it would be inequitable to permit the opposite party thereafter to claim a different and independent construction. In that event the doctrine of estoppel intervenes, and the practical construction becomes more than persuasive evidence of the meaning of the contract. It then becomes the contract itself, and cannot be disputed; for, as this court said in Insurance Co. vs. Dutcher, *supra*, "the construction of a contract is as much a part of it as anything else."

Speaking of the doctrine of equitable estoppel, this court, in Morgan vs. Railroad Co., 96 U. S., 716, 720, said:

> "The principle is an important one in the administration of the law. It not unfrequently gives triumph to right and justice where nothing else could save them from defeat. It proceeds upon the ground that he who has been silent as to his alleged rights

when he ought in good faith to have spoken, shall not be heard to speak when he ought to be silent."

And in Dickerson vs. Colgrove, 100 U. S., 578, 580:

"The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change is positively forbidden by law. It involves fraud and falsehood, and the law abhors both."

And in Kirk vs. Hamilton, 102 U. S., 78:

"He was silent when good faith required him to put the purchaser on guard. He should not now be heard to say that that is not true which his conduct unmistakably declared was true, and upon the faith of which the other acted."

And in Union Pacific vs. McAlpine, 129 U. S., 314:

"A principle of common justice forbids that one shall be permitted to lead another to act upon a contract of purchase with him and incur expense by reason of it, and then, upon some pretext of a defect in a matter of form, refuse compliance with its provisions, and thus deprive the purchaser of the benefit of his labor and expenditures."

An excellent statement of the doctrine was made by the Circuit Court of Appeals for the Eighth Circuit in Gibbon vs. Times Republican Printing Co., 114 Fed., 92, as follows:

> "No principle is more universal in the jurisprudence of civilized nations; no principle is more equitable in itself, or more salutary in its effects, than that one who by his acts or representations, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist, and the latter rightfully acts on such a belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts, is thereby conclusively estopped to interpose such denial. This principle is equitable because it forbids the untruthful or culpably negligent deceiver from profiting by his own wrong at the expense of the innocent purchaser or contractor who believed him. It is salutary, because it represses falsehood and fraud. It rests on the solid foundation of our common sense of justice, which revolts at the idea of rewarding the intentional or culpably negligent deceiver at the expense of the innocent purchaser who believed him."

That this doctrine will prevent a change of position relative to the meaning of a contract must, on

principle, be true; for, as has been said, *ex post facto* construction is as bad as *ex post facto* legislation.

Gelpcke vs. City of Dubuque, 1 Wall., 175, 206.

And so the courts have held.

In Leet vs. Pacific Mill & Mining Co., 88 Fed., 957, it was held that—

> "Where the understanding of the meaning and effect of a contract with which it was executed by one of the parties was known to the other, who made no objection thereto, the latter is estopped to afterwards claim a different construction, to his own advantage and the detriment of the other party."

The decision was affirmed by the Circuit Court of Appeals for the Ninth Circuit, the court saying (94 Fed., 968, 974):

> "Having allowed the defendant in error to act upon the understanding had by both parties, the plaintiff in error cannot now deny that understanding, to the loss or injury of the defendant in error."

This principle has been applied to municipal corporations. In District of Columbia vs. Gallaher, 124 U. S., 505, this court held, applying the doctrine against the district, that—

> "When in the performance of a written contract both parties put a practical con-

> struction upon it which is at variance with its literal meaning, that construction will prevail over the language of the contract."

In 3 Abbott on Municipal Corporations, page 2165, the author, after discussing the doctrine that public grants are to be strictly construed, says:

> "The principles of this section are not applied, however, to such an extent as to illegally deprive a grantee or licensee of property or rights which it may have acquired under a previous and more favorable construction of the license or grant. The doctrine of equitable estoppel operates as against the public authorities."

By repeated decisions this court has applied the doctrine to municipal corporations. In Zabriskie vs. Railroad Co., 23 How., 381, 400, the court says:

> "A corporation, quite as much as an individual, is held to a careful adherence to truth in their dealings with mankind, and cannot by their representations or silence involve others in onerous engagements, and then defeat the calculations and claims their own conduct had superinduced."

The foregoing is quoted and the principle applied to municipal corporations in the following cases:

> Bissell vs. City of Jeffersonville, 24 How., 287, 300.

Moran vs. Commissioners, 2 Black, 722, 723.

County of Randolph vs. Post, 93 U. S., 502, 513.

In State vs. Milk, 11 Fed., 389, it was said:

> "Resolute good faith should characterize the conduct of states in their dealings with individuals, and there is no rule of morals or law that will exempt them from the doctrine of estoppel."

And in Woodruff vs. Trapnell, 10 How., 190, 208, this court said:

> "We naturally look to an action of a sovereign state to be characterized by a more scrupulous regard to justice and a higher morality than belong to the transactions of individuals."

And in Beadles vs. Smyser, 209 U. S., 393, 402, this court said:

> "That the principles of right and justice, upon which the doctrine of estoppel in *pais* rests, are applicable to municipal corporations is recognized by text writers and in well considered cases."

This court has by repeated decisions, and under varying circumstances applied the doctrine to municipal corporations.

Clark vs. Washington, 12 Wheat., 40.

Board vs. Aspinwall, 21 How., 539.

Bissell vs. Jeffersonville, 24 How., 287.

Moran vs. Commissioners, 2 Black, 722.

Mercer County vs. Hackett, 1 Wall., 83.

Van Hastrup vs. Madison, 1 Wall., 291.

Meyer vs. Muscatine, 1 Wall., 384.

Supervisors vs. Schenck, 5 Wall., 772.

Kenicott vs. Supervisors, 16 Wall., 452.

Pendleton County vs. Amy, 13 Wall., 297, 305.

Nugent vs. Supervisors, 19 Wall., 241.

Convers vs. Fort Scott, 92 U. S., 503.

Moultrie County vs. Savings Bank, 92 U. S., 631.

Hitchcock vs. Galveston, 96 U. S., 341, 351.

Boone County vs. Burlington, 139 U. S., 684.

City Ry. Co. vs. Citizens Street R. Co., 166 U. S., 537, 566.

In a number of the foregoing cases the relations involved were of like character to those presented by this record. See also:

Illinois Trust & Savings Bank vs. City of Arkansas City, 76 Fed., 271.

Los Angeles Water Co. vs. City of Los Angeles (10th syllabus), 88 Fed., 720.

Same case affirmed, 177 U. S., 558.

Thomas vs. Cincinnati etc. Ry. Co., 81 Fed., 911.

State Trust Co. vs. City of Duluth, 104 Fed., 632.

City of Austin vs. Bartholomew, 107 Fed., 349, 354.

McGonigle vs. City of Defiance, 140 Fed., 621, 627.

Des Moines City Ry. Co. vs. City of Des Moines, 151 Fed., 854, 862, 863.

The law as declared by the highest courts of Colorado is the same.

Denver Tramway Co. vs. Londoner, 20 Colo., 150, 157.

Colorado Springs vs. C. & S. Ry. Co., 38 Colo., 107, 112, 113.

Colorado Springs vs. Colorado City, 42 Colo., 75, 84, 85, 88, 89.

Water Company vs. City of Grand Junction, 14 Colo. App., 424.

And to the same effect see:

City of Seattle vs. Stirrat, 55 Wash., 560; 104 Pac., 834, 835, 836.

Ogden City vs. Bear Lake Co., 28 Utah, 25; 76 Pac., 1069, 1073, 1074.

The bill alleges (p. 5) the issuance of the Water Company's bonds to the amount of $8,000,000, secured by the mortgage in which the complainant is trustee, the negotiation of the same, the expenditure of large sums of money by the Water Company in improving and enlarging the plant (pp. 7-9), and the fact that the bonds were issued and the moneys of

investors secured for the purpose of making these improvements, in the full belief and understanding and in reliance thereon that the contract obligations of the defendant City, as hereinabove explained, would be fully and faithfully performed, fulfilled, carried out and observed (p. 10).

The cross-bill alleges the purchase of the waterworks system in 1894 by The Denver Union Water Company, and the expenditure since that time of many millions of dollars thereon, and that this was done upon the faith and with the belief and understanding that the contract evidenced by Ordinance No. 44, as hereinabove explained, "and as then and there understood, agreed to and acted upon by both parties thereto," would be fully carried out and performed (p. 121); that the construction of said contract, as hereinabove explained,

> "has been the construction and understanding of both parties to the contract from the beginning, and that on the faith of said construction and understanding, this defendant, with the knowledge of said The City and County of Denver and its predecessor, has invested large sums of money in the acquisition and enlargement of its water works system or plant" (pp. 123, 124).

And again:

> "This defendant further avers that, in reliance upon its contract relations with said The City and County of Denver, as hereinabove set forth, and upon the obligation of

said City and County of Denver either to purchase all of this defendant's water works system and plant, and pay for the same at the valuation to be placed by appraisement, or failing in that, the obligation of said The City and County of Denver to renew said Ordinance No. 44 of the Series of 1890, for an additional period of twenty years from and after April 10, 1910, this defendant has invested large sums of money, to wit: many millions of dollars, in the acquisition, completion and enlargement of said water works system and plant, all with the knowledge and consent of said The City and County of Denver (which then and there well knew the claims and understanding of this defendant as to its contract rights aforesaid, and assented thereto and concurred therein)" (pp. 137, 138).

And it appears that several hundred thousand dollars have been expended in the enlargement of the plant since April 10, 1910 (p. 138).

From the affidavit of Mr. Robinson it appears that Mr. Underwood, who represented The Denver Water Company in negotiating the contract evidenced by said Ordinance 44, advised said Water Company immediately after the enactment of the ordinance, that "under the terms of said ordinance, the City would at the expiration of the period of twenty years therein mentioned be obligated either to purchase the water works system or plant, as therein contemplated, or, in lieu thereof, to renew the contract evidenced by

said ordinance for an additional period of twenty years;" and that "such has ever since been and is now the understanding of the The Denver Water Company and its various successors, including The Denver Union Water Company, as to the meaning and legal effect of said Ordinance No. 44;" and "that in reliance thereon the Denver Water Company and its said various successors have invested large amounts of capital, which have been required for the acquisition of said plant and the various portions thereof and the various enlargements, extensions and betterments thereof;" and that the Water Company "acquired said property, in reliance upon said construction of said contract evidenced by said ordinance;" and that "accordingly, the bonds issued by said Company * * * were made to run to and mature in the year 1914, with the privilege of paying the same within the year intervening between April 10, 1910, and April 9, 1911, provided the City exercised its right of purchase" (standing alone, this would work an estoppel; 166 U. S., 557, 566); and that "said City of Denver and its successor, the City and County of Denver, has at all times had knowledge, as affiant is informed and believes, of said understanding and construction of said contract by said The Denver Water Company and its successors, including the said The Denver Union Water Company, and until very recently has not dissented therefrom, but, on the contrary, has acquiesced and concurred therein" (pp. 188 and 189); and that "no official or other action was ever taken by said The City and County of Denver indicating dissent from said construction of Ordinance No. 44 of the Series of 1890 originally placed thereon by The Denver Water Company, and ever since relied and

acted upon by that company and its successors, until the alleged adoption of said section 264A of the Charter at the city election in May, 1910" (p. 190).

As evidence that the same construction was placed upon said Ordinance 44 by the City Council of Denver, attention is called to Ordinance No. 54 of the Series of 1894, which is Exhibit C to the affidavit of Robinson (pp. 189, 210 *et seq.*). This ordinance was approved by the mayor December 15, 1894, and therefore was considered and passed by the council almost contemporaneously with the acquisition of the waterworks by The Denver Union Water Company, and the giving of the mortgage to secure the bond issue. Said Ordinance No. 54 is known as the South Denver lease. South Denver was originally an independent municipality, and its corporate limits are shown upon the map which is attached to the affidavit of Mr. D. G. Thomas (Record, p. 235). On February 7, 1894, it was annexed to the then City of Denver. At the time of annexation South Denver had a water plant of its own, including a system of distributing pipes laid in the streets of the town. After annexation it was determined by the city officials that it was wiser to turn this plant over to The Denver Union Water Company and allow it to be operated as a part of its general waterworks system, which was accordingly done, and said Ordinance No. 54 of the Series of 1894 is the contract by which the result was accomplished. This contract was in the nature of a lease of all the physical portions of the South Denver plant, "for and until the 10th day of April, A. D. 1910." It will be noted that this is the date on which the right of purchase provided by Ordinance 44 of the Series of 1890 shall accrue (p. 210). It was con-

templated and provided that The Denver Union Water Company should add to the plant from time to time, and that whatever additions were made should be the property of The Denver Union Water Company (p. 211). By section 3 of the lease (p. 211) it was provided that, upon the termination of the lease, the new construction made by The Denver Union Water Company, and also the original plant, should be appraised, and—

> "the City of Denver may pay to said The Denver Union Water Company, its successors and assigns, upon the termination of this lease, the value of such new construction made by The Denver Union Water Company during the existence of said lease, if the City of Denver, before such appraisement is made, elects to purchase such new construction. In the event of the City of Denver concluding not to purchase such new construction, then The Denver Union Water Company, its successors and assigns, shall purchase the pipes and mains of the City of Denver then being in the streets, avenues and alleys in the territory formerly known as the Town of South Denver, at the appraised value thereof, * * * (p. 378) and the said The Denver Union Water Company shall, within sixty days after the appraising of said pipes, mains, hydrants and pumping machinery, pay such appraised value to the City of Denver and receive from said City of Denver a conveyance of such pipes and mains, *and the City of Denver within the*

sixty days of the said last named appraisement to grant to said the Denver Union Water Company, its successors or assigns, a franchise to operate and maintain said plant and water system in the said territory of South Denver upon the same terms specified in Ordinance No. 44 of the Series of 1890 of the City of Denver, the rates to be charged under such ordinance or franchise to be the same as charged during the term of such franchise in other portions of the City of Denver."

We submit that this is a construction of Ordinance 44 by official, legislative action of the City, through its council and its mayor, which indicates beyond the possibility of a doubt the City's understanding that at the expiration of the twenty-year period mentioned in Ordinance 44 the City would be obligated either to purchase the entire water plant or to renew the contract or franchise.

The South Denver lease, as will be observed, makes express reference to Ordinance 44, and so construes it. The South Denver lease, as will be observed, in express terms requires the City either to purchase the new construction of the Water Company or to grant a new franchise "upon the same terms specified in Ordinance No. 44;" but the plant in South Denver was an integral part of the entire plant owned and operated by the Water Company. The territory embraced in the former Town of South Denver was an extensive and important portion of the City of Denver. It is not conceivable that the City of Denver would have obligated itself either to

purchase or to grant a new franchise in that part of the city unless it had been its understanding that it was under the same obligation in respect to other parts of the City; and if so, that obligation arose from Ordinance No. 44 of the Series of 1890. It is not conceivable that the City of Denver would have so obligated itself in reference to South Denver, if, in reference to other portions of the City, it was at liberty neither to purchase nor to renew the franchise; but, on the contrary, to sever all relations with the Water Company and install a municipal plant. It is not believable that the City would have so bound itself as to South Denver, if it had not considered that it was bound in like manner as to the remaining portions of the City. We therefore conclude that the South Denver lease is an affirmative and official act by the council and the mayor of the City, authorized to bind the City in such matters, which so fixes the meaning and construction of Ordinance No. 44 of the Series of 1890 that it may not thereafter be denied.

But this not all. On March 3, 1908, Hon. Charles S. Thomas, one of the solicitors for the appellants herein, both in the trial court and in the Circuit Court of Appeals was in the employ of the City and County of Denver as special counsel, having in charge the interests of said City in respect of its relations with The Denver Union Water Company (p. 190). On that date, in answer to an inquiry from the mayor as to the correct construction of said Ordinance No. 44 and the contract evidenced thereby, Governor Thomas wrote a formal opinion, which is attached to the affidavit of Robinson as Exhibit D (pp. 213 *et seq.*). It is probably unnecessary to quote at length from this letter, as the court will doubtless read with

interest and consider with care the entire document. Suffice it to say that Governor Thomas formally advises the City, in the most definite terms, that the contract means exactly what the City and the Water Company had always believed it to mean, and exactly what we have here contended that it does mean. Learned counsel says, among other things (p. 214):

> "The rights and privileges granted by sections 1 and 2 are absolute, far reaching and unconditional. They can be terminated only in the manner provided by the ordinance, but the ordinance provides no right or method of termination other than the election by the city to purchase the works under the provisions of section 11. This impression is confirmed by the recitals of section 20, which provide that all apparatus then owned or thereafter laid in or set in or upon any streets, alleys, or other public places, shall be and remain the sole and absolute property of the water company, its successors and assigns 'which shall forever be considered and entitled to be in possession thereof, except in case of purchase by said city under the terms of this ordinance or some agreement between the said city and said company, its successors or assigns, in and to the subject-matter hereof, shall vest in said city.' It would seem to follow that if on April 10, 1910, the city should decline to affirmatively exercise its election to purchase the rights and privileges granted under said ordinance, the latter would not be terminated unless the

city and the company under section 20 could arrive at some agreement between themselves.

But the power of termination in such event would rest entirely with the company, whose assent to any arrangement would be imperative and therefore subject to such terms as it might impose.

* * * * * * * *

But the city may, on April 10, 1910, under section 12 elect to 'renew the contract hereby made.' What contract? Section 21 mentions several grants, contracts and agreements. It also declares each of them to be separate and independent. The context of the 12th section would indicate that the contract which the city may renew is that for supplying water to the municipality and possibly for fixing rates to private consumers. It may 'renew' that is, it may continue the existing arrangement, subject only to a reduction of 10 per cent. on hydrant rentals. The 'renewal' of a contract is in one sense a new agreement; it is actually the continuation or extension of an old one. The term 'renew' was advisedly placed in the ordinance. Its meaning is obvious. The city may continue the existing conditions, but it cannot change them except as to hydrant rentals.

If we suppose that the city and county of Denver on April 10, 1910, declines to exercise its election either to purchase the water

works or to 'renew' the contract for water supply, what then will be the relation of the water company to the city and county? I do not perceive that its powers and privileges are in any wise changed. I find nothing in the ordinance to justify the conclusion that any covenants will have been terminated by lapse of time except as to the rates for hydrant rentals and dates of payments by the city to the company under section 10, and its obligation under section 14 to furnish the city water free of charge for city hall, fire department houses and for flushing and sprinkling purposes. On the other hand, if the city declines to purchase at the time indicated, its right to do so under the ordinance is gone. Should it also decline to renew the contract for water service, the latter would probably continue subject to the possible execution of some new agreement therefor, which, if made, would be entirely independent of the ordinance itself.

The views above expressed are those of first impression. A critical and exhaustive examination of the ordinance might not justify them.

However this may be, I can safely affirm that ordinance No. 44 is one of the most shrewdly drawn, carefully prepared and thoroughly effective instruments for the creation, continuance and safeguarding of private rights and privileges I have ever seen. It is difficult to suggest its possible improve-

> ment for such purposes. It practically stripped the city of every safeguard, and the right of election to purchase, which is grudgingly given, rigidly binds it to the bargain, however extortionate the price may be. I am informed that at the time the ordinance was adopted the most strenuous efforts were made to eliminate this solitary protective feature."

It would be difficult for us to add anything to the clear exposition of the rights of the parties under said contract, thus made by learned counsel. It set forth in the most positive terms the obligation of the City either to purchase or to renew, and clearly points out that the City has no third alternative under which, by refusal to purchase or to renew, all relations with the Water Company shall be severed, and all rights of the Water Company under Ordinance 44 shall cease. The latter idea never occurred to anyone until some time in the spring of 1910, or in any event not until after the appraisers had found the value of the Water Company's plant to be $14,400,000, when the City began to search for some method by which it might escape its obligations.

Ordinance No. 163 of the Series of 1907 is a further official construction by the City of Denver of Ordinance 44. Ordinance 163 recites the unwillingness of the Water Company to expend large sums of money "in building pipes and conduit lines for use in the future, and after the arrival of the time when the said city and county will have the right to purchase said plant under appraisement, in view of the exist-

ing uncertainty as to whether the city will exercise its right and option to purchase said plant at said time" (p. 159). Thus the fact is clearly recognized that, even though the City does not purchase, the plant will continue to be used by the Water Company for the purpose of furnishing a water supply.

Again, by section 8 of said Ordinance 163 (p. 164) it is provided that if the qualified electors shall refuse to accept either of the propositions to be placed before them under the terms of said ordinance, in that event the making of said agreement and the submitting of said matters to vote "shall not constitute a waiver of the rights or privileges of either party hereto, or prejudice in any manner or form or to any extent whatever the rights and privileges" of either party under said Ordinance 44; but "all the rights, privileges and franchises of either party hereunto provided for or contained in and by the terms of said contract and ordinance shall be and remain in full force and effect, the same as if this contract and agreement had not been entered into and none of the proceedings herein provided for had been taken." A clear recognition of the fact that the rights under said ordinance continued, although the purchase was not effected.

Upon the foregoing we submit that no case was ever presented which more clearly demands the application of the doctrine of estoppel. The language of Ordinance 44 clearly sets forth the contract for which we contend. There is no room for construction, because the words do not admit of any other meaning. But if its meaning were fairly open to doubt, the construction which both parties placed thereon at the

beginning, which the Water Company has always relied upon, and which the City has always concurred in, both unofficially and by the most formal official acts, must prevail; and when, in reliance upon that meaning of the contract, the Water Company and the bondholders have invested many millions of dollars in their effort to supply the City and its inhabitants with water, have built up a plant recently appraised by experienced men of the highest character at the value of $14,400,000, equity, morality and common honesty absolutely forbid a change of position upon the part of the City, whereby the safeguards provided for this enormous investment will be destroyed, the waterworks system become useless junk, encumbering the streets of Denver, and the money of the stockholders and bondholders be irretrievably lost.

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5. Ordinance 163, Series of 1907.

Upon the foregoing dicussion we submit, without fear of successful contradiction, that, by the contract made on April 10, 1890, and evidenced by Ordinance 44, the City was obligated, at the expiration of the period of twenty years, either to purchase the plant or to allow the contract to continue. It had no third alternative of refusing to do either. But section 11 of Ordinance 44 required the purchase to be made, if at all, "at the expiration of the period of twenty years from and after the date of the passage and approval of the ordinance." That time would not arrive until April 10, 1910. Apparently recognizing the confusion and embarrassment that might result if the right to

purchase and appraise were postponed until the day of the expiration of the twenty-year period, the City, in the year 1907, approached the Water Company and procured from it a waiver of the right to insist that the purchase could not be made until the expiration of said period, and its consent that the appraisement might be had and the purchase effected prior to said date. Thereupon, and on October 2, 1907, Ordinance No. 163 of the Series of 1907 was enacted, and the contract thereby authorized duly executed; it is set forth in the record as an exhibit to the cross-bill at pages 157-167. It recites the making of the contract of April 10, 1890, and sets forth in full section 11 thereof (pp. 157 and 158). It sets forth the provisions of section 5 of Ordinance 44, relative to rights to private consumers (p. 158). It recites (p. 158) that "it has been deemed desirable that efforts should be made for and on behalf of the City and County of Denver to purchase the water plant and property owned and used by The Denver Union Water Company in supplying water to the City and County of Denver and the inhabitants thereof, in accordance with the terms and provisions of the said contract of April 10, 1890, and upon a valuation thereof fixed by disinterested appraisers selected in accordance with the terms of said contract." It recites (p. 159) that the Water Company has waived "the right to insist that said purchase could not be made under the terms of said contract until after the expiration of the period fixed therefor in the paragraph thereof hereinbefore quoted." It recites (p. 159) "that in view of the shortness of time which will elapse before the appraisers are to be appointed under

and in accordance with the terms of the contract of April 10, 1890, the said The Denver Union Water Company is unwilling to expend large sums of money in building pipes and conduit lines for use in the future and after the arrival of the time when the said City and County will have the right to purchase said plant under appraisement, in view of the existing uncertainty as to whether the City will exercise its right and option to purchase said plant at said time." It recites (p. 159) that the City has obtained from the Water Company its consent to waive the period of time fixed and set forth in section 11 of Ordinance 44, "and to permit the City and County of Denver to purchase said property upon an appraisement, and in accordance with the terms and conditions of said contract and ordinance, without awaiting the expiration of the period fixed therefor in and by the terms of said contract and ordinance." It recites (p. 160) that the City has exacted and required of the Water Company an agreement to submit to the City Council, and through it to the qualified electors, a proposition for a new contract, with proposed rates for water furnished both to private consumers and to the City for municipal purposes, which rates are to be fixed by the appraisers appointed to appraise the property, to the end that two questions may be submitted to the electors of the City and County of Denver, to-wit: First—Shall the City and County of Denver purchase? Second—Shall the people of Denver make a new contract, containing provisions for said new rates, "so that the said electors of the City and County of Denver, so qualified to vote thereon, shall have the choice and opportunity of determining which of

said propositions they may desire to accept"? Provisions are thereupon made in reference to the appraisers and the fixing of rates by them, and their report thereon; and the contract then proceeds (p. 163): "And thereafter and as soon as may be by proper procedure in accordance with law, there shall be submitted to the electors of the City and County of Denver to vote thereon, the question of whether the City and County of Denver shall purchase" the property at the appraised price; "and also at the same time, to the electors qualified to vote thereon, the question as to whether a contract or franchise shall be granted to The Denver Union Water Company," containing new terms and upon the new rates to be fixed by the appraisers.

By section 6 (p. 163) it is provided that, if the electors refuse to make the new contract upon the new terms, but accept the proposition in reference to purchase, the purchase shall be effected in a certain manner.

By section 7 (p. 164) it is provided that if, at said election, the electors refuse to accept the proposition of purchase, but vote to grant a new contract upon the new terms, the Company shall thereupon receive such new contract for a period of twenty years from the date of said election.

By section 8 (p. 164) it is provided that if at said election, which—

> "shall be a special election called for considering said two propositions, the electors qualified to vote thereon shall by their majority vote refuse to accept either proposition as to the purchase of said property, or as to the

granting of a new contract, the action of the said parties hereto in entering into this agreement and in submitting said matters to the vote of the electors qualified to vote thereon as herein provided, shall not constitute a waiver of the rights or privileges of either party hereto, or prejudice in any manner or form, or to any extent whatever, the rights and privileges of the City and County of Denver, party of the first part, or The Denver Union Water Company, party of the second part, under and by virtue of the provisions, or any of them, of the said contract of April 10, 1890, being said Ordinance No. 44 of the series of 1890, all the rights, privileges and franchises of either party hereunto, provided for or contained in and by the terms of said contract and ordinance shall be and remain in full force and effect the same as if this contract and agreement had not been entered into and none of the proceedings herein provided for had been taken."

But by the contract of April 10, 1890, the City had but one choice; namely, it must choose either to purchase or to renew; it had no right to do neither; but if it should elect to renew, that amounted merely to a continuance of the contract for service, as contained in the ordinance of 1890, with a possible reduction of ten per cent. in hydrant rentals. Moreover, by the contract of 1890 the right of choice there presented must be exercised by the mayor and city council, and not by the electors; whereas, in 1907 the grant of an

entirely new franchise or contract could only be made by the qualified taxpaying electors, because of the provisions of Article XX of the Constitution and the charter of the City which had been adopted thereunder. But, notwithstanding these constitutional and charter changes, the right of choice afforded by Ordinance 44 of the Series of 1890 necessarily continued in the mayor and City Council, because so fixed by the contract.

But prior to the passage of the Ordinance No. 163 of the Series of 1907, as the ordinance recites, the City had obtained the consent of the Water Company that it might exercise right of choice prior to April 10, 1910, and had done so at the request of the mayor and City Council. Said ordinance, which speaks for the mayor and City Council, also recites that it has been deemed desirable by them that efforts should be made to purchase the water plant "in accordance with the terms and provisions of the said contract of April 10, 1890, and upon a valuation thereof fixed by disinterested appraisers selected in accordance with the terms of said contract" (p. 158); and said appraisement is thereupon had in accordance with the terms of Ordinance 44 of the Series of 1890, resulting in a valuation of $14,400,000.

Remembering that the right of choice originally provided remained always with the mayor and City Council, we submit that these acts constituted a binding election to purchase. But Ordinance No. 163 introduces a new element into the problem. We submit that that ordinance, and the contract executed pursuant to its terms, fairly construed amount only to this: they added an alternative not theretofore pos-

sessed by the City, to-wit: the right, instead of purchasing or renewing the contract evidenced by Ordinance 44, to enter into a new contract with the Water Company upon new and different terms; but this right of election necessarily must be submitted to the taxpaying electors, because it involves the grant of a new franchise, and under the Constitution and charter as amended this could only be done by the taxpaying electors. To repeat: The original contract obligated the City either to purchase or to renew. The arrangement of 1907 added a third alternative; namely, the right to grant a new franchise upon different terms, in lieu of doing either of the other things. As a result, the determination of the mayor and City Council that it was wise to proceed to purchase the property in accordance with the terms of Ordinance No. 44, and the appraisement had thereunder, constituted a binding election to purchase the property at the appraised price, unless the City, represented by its qualified taxpaying electors, should choose to avoid the obligation by granting a new franchise upon new and different terms. We submit that this is a reasonable construction of the language of Ordinance 163. It is the only construction which can account for the making of the contract; for it is not reasonable to suppose that the Water Company, having a binding contract with the City, whereby the City was obligated through its Mayor and City Council to choose between purchasing the property and renewing the contract, and whereby the election to purchase must precede the appraisement of the property, would, without any consideration, waive these valuable rights, consent that its property might be appraised for experimental pur-

poses only, and that thereafter the City might purchase if satisfied with the appraisement, or refuse to purchase if dissatisfied, the Company being at all times bound to sell at the appraised price, whatever it might be. It is only by supposing that the Company understood that under Ordinance 163 the City was pledged either to purchase its property at the appraised value, or to grant it a new franchise or contract upon terms more satisfactory, and fixing rates more advantageous and remunerative than the old, that we can at all account for the Company's willingness to enter into the arrangement. No other construction could account for or justify the language of section 8. This construction does. In section 8 (Record, p. 164) it is provided, as will be remembered, that in case the electors vote down both propositions, the action of the parties "in entering into this agreement and in submitting said matters to the vote of the electors" shall not constitute a waiver of the rights or privileges of either party, or prejudice in any manner or form, or to any extent whatever, the rights or privileges either of the City or of the Water Company,—

> "under and by virtue of the provisions, or any of them, of the said contract of April 10, 1890, being said Ordinance No. 44 of the series of 1890, all the rights, privileges and franchises of either party hereunto, provided for or contained in and by the terms of said contract and the ordinance shall be and remain in full force and effect the same as if this contract and agreement had not been

entered into and none of the proceedings herein provided for had been taken."

But the determination by the mayor and City Council that it was desirable to make efforts to purchase the property of the Company under the terms of the contract of April 10, 1890, and the appraisement of the property for that purpose, were not "proceedings herein provided for;" they were provided for in Ordinance 44, and were done pursuant to its terms; and the consent of the Water Company that the right of purchase might be exercised prior to April 10, 1910, was not a "proceeding herein provided for," nor was it embraced in the agreement or contract executed pursuant to the terms of Ordinance 163; for, as that ordinance recites, such consent had been obtained by the City before the ordinance was enacted or the contract executed.

But the consent of the Water Company was upon condition that the purchase be effected "without awaiting the expiration of the period fixed therefor in and by the terms of said contract and ordinance (of 1890)" (pp. 159, 160). And section 11 of the contract of 1890 (p. 151) provided that the purchase should be consummated at the expiration of the period of twenty years—to-wit, on April 10, 1910. The City has never taken advantage of the third alternative afforded by the contract of 1907—to-wit, that of granting a new franchise or contract upon new and different terms. It has not even submitted the question to the qualified electors. April 10, 1910, has come and gone, and the City has taken no steps to consummate the purchase. On the contrary, both officially and unofficially, it has declared its intention

not to do so. This we shall presently enlarge upon. At this point it is sufficient to say that the City's right to purchase the plant, and so absolve itself from the old contract, was contingent upon its effecting that purchase on or before April 10, 1910. Its right to grant a new franchise or contract upon new and different terms, and so absolve itself from the necessity of purchase, was likewise contingent upon the submission of that question to the approving vote of the qualified electors prior to April 10, 1910. It is the contention of the Water Company that, by failing to do either of these things within the time required, the alternative obligation fixed by the contract of 1890 has come into operation, and the City is now bound to continue and recognize and effectuate the continuance of the contract thereby evidenced for an additional period of twenty years, notwithstanding it is also true, as the complainant contends, and as the Water Company does not deny, that the acts of the Mayor and City Council constituted a binding election to purchase.

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6. Contentions of the City Respecting the Construction of the Contract.

The petitioners assert that "It is the contention of the City that Ordinance 44 expired, *ex vi termini*, on April 10, 1910." (Petitioners' Brief, p. 86.) The assertion is repeated at pages 89, 132, 183, and doubtless at other places in the argument, the matter being summed up, at page 90, in the following words:

> "The City's position is that there are no contract relations between it and the Water

> Company, and no duty or obligation owing from it to that company."

But learned counsel for the petitioners fail to point out any words contained either in Ordinance 44, Series of 1890, or elsewhere, to justify the assertion that that contract, or any contract, expired *"ex vi termini"* upon the date mentioned, or that it has yet expired.

If we take the language of the brief at its face value, the claim is that all rights of the Water Company terminated on April 10, 1910; but its right to do business as a corporation, and as such corporation to conduct the business of furnishing the City of Denver and its inhabitants with water, and of taking tolls therefor, are rights granted by the State of Colorado, over which the City of Denver had no control either on April 10, 1890, or on April 10, 1910. These rights certainly have not terminated. (Printed Record, p. 112.)

The easement in the streets originally granted in 1870, without limitation as to time and without provision as to its revocation, is still in effect. This is conceded in the short discussion of this matter contained in petitioners' brief at pages 90-92, but coupled with the assertion that such rights are not exclusive in their character. We make no claim to such exclusiveness, and have not done so at any stage of this proceeding. Not only are these street easements still in full force and effect; not only was the original grant thereof made in fee and in perpetuity; but, as we contend, they are protected by a valid agreement to the effect that no attempt to revoke them

shall be made until the City purchases the water plant.

What, then, did come to an end *"ex vi termini"* on April 10, 1910? The City says that Ordinance 44, Series of 1890, so terminated, and petitioners' discussion of this subject will be found at pages 92-104 and 118-130 of their brief.

Much is said about the doctrine of strict construction; but it must be remembered that in making this contract the City acted in its proprietary or business capacity, and not in its capacity as a governmental agent. It must also be remembered that the City is bound by the same rules of good conduct, and subject to the same principles of estoppel, as is an individual. It must also be remembered that the stipulations relied upon by the Water Company are such as this court has designated as "limitations designed to do little more than bind the city to carry out the contract in good faith and with decent regard for the rights of the other party."

> Vicksburg vs. Vicksburg Waterworks Co., 202 U. S., 453, 468.
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> Walla Walla vs. Walla Walla Water Co., 172 U. S., 1, 18.

No rule of strict construction has been referred to by petitioners, and we submit that none exists, which requires the court to reject the plain language of an instrument and disregard the clear import of its terms; and under no such rule can it be successfully asserted that it is incumbent upon the court to read into the instrument that which it does not contain, and which, if interpolated, would be in conflict

with its express terms. And yet these things are necessary to support the contention of petitioners.

They say that all rights terminated on April 10, 1910. But where within the four corners of Ordinance 44 of 1890 is any such provision to be found? The court is called upon to interpolate; yet this is exactly what the court refused to do in a series of cases culminating with Louisville vs. Cumberland Telephone Co., 224 U. S., 649, and which other courts have refused to do in the cases approved by this court, in all of which cases it is held that where the grant by the municipality is not by its terms limited and revocable, the grant is in fee and in perpetuity.

But if the court should disregard this settled principle, and undertake to interpolate that which plainly was not within the contemplation of the parties at the time of the passage of the ordinance, we submit that the new clause thus added would be in conflict with the positive terms of the ordinance as originally enacted.

Under the terms of this ordinance, what terminated on April 10, 1910?

It was not the street rights, because those existed prior to the passage of Ordinance 44 of 1890, unlimited as to duration, and expressly confirmed and preserved by the terms of the latter ordinance (Printed Record, p. 146). These street rights were to continue until "terminated in the manner hereinafter in this ordinance provided" (p. 149)—to-wit, by purchase, as set forth in section 11 (p. 151), and until such purchase is effected, the Water Company, by section 20 (p. 153), "shall forever be considered and entitled to be in possession thereof."

It was not the contract with the City relative to the schedule of maximum rates to private consumers; for the contract in that regard is made by section 5 of the ordinance (p. 149), and there is no provision for its termination except that contained in sections 11 and 20, which provide for the termination of all rights when the purchase has been effected, but which provide with equal clearness for the continuance of such rights until such purchase has been effected.

Was it the contract with the City for a municipal water supply, evidenced by section 10, which so terminated? (Printed Record, page 151.) If so, it has been renewed by the failure to purchase and as provided in section 12, the purpose of which, as petitioners say (Petitioners' Brief, p. 122), was to insure to the City a 10 per cent reduction in the hydrant rentals. True, no new ordinance has been passed in reference to the municipal water supply, as contemplated by section 12, but the Water Company has waived that, as it had a right to do, and is furnishing water to the City for its municipal use at the 10 per cent reduction provided in section 12.

Section 10 relates exclusively to water supplied to the City through hydrants for municipal uses and the City's payment therefor, and if the agreement in this regard had terminated, by virtue of the language of that section, all other rights conferred by Ordinance 44 would continue, for they are nowhere limited. But the contract embraced in section 10 may be renewed by the City. It has been renewed by the failure to purchase. The right is expressly reserved, by section 12, to have a 10 per cent reduction in the

hydrant rental, if the City has complied with the terms of section 2. And this reduction is in effect. How, then, can it be said that this ordinance, or any part of it, has "*ex vi termini*" come to an end?

Petitioners adopt the unfair method of segregating sections 11 and 12 from all other parts of the ordinance, and then assert that, inasmuch as neither of these sections imports an obligation, therefore both taken together cannot constitute alternative obligations.

They also, at page 104 of their brief, point to section 21 of the ordinance, and maintain that, by virtue of its terms, each section of this ordinance is to stand alone, and therefore sections 11 and 12 cannot be considered together. But counsel overlook or ignore the distinction between the several sections of this ordinance and the several agreements which the ordinance sets forth. The agreements contained in this ordinance, each evidenced by several sections, are as follows:

(a) That the street rights theretofore granted shall continue, and shall not be revoked or terminated until the City shall purchase the plant;

(b) That the Water Company may charge rates to private consumers not exceeding those specified in Schedule A;

(c) That the City itself shall pay at certain rates for the water furnished for strictly municipal uses, and shall receive certain other water for such uses free of charge.

These are the independent agreements referred to in section 21 of the ordinance, and the failure, termination or rescission of any one of them does not affect either of the others; and we submit that none

of them came to an end on April 10, 1910, by virtue of any language contained in this ordinance.

But it is contended (Petitioners' Brief, p. 118) that language contained in Ordinance 163, Series of 1907, indicates the understanding of the parties that the City was not compelled by Ordinance 44 "either to renew or purchase." It has been the belief and understanding of the Water Company and its predecessors at all times that the City could not terminate the relations contemplated by Ordinance 44 except by the purchase of the Company's plant, and that, until such purchase was made in the manner provided in said ordinance, such relations must continue. We submit that nothing contained in Ordinance 163 indicates any different understanding. We have hereinbefore reviewed said ordinance, and can add nothing to what was there said.

It is contended (Petitioners' Brief, p. 120) that the construction now and at all times placed upon Ordinance 44 by the Water Company and its predecessors "involves injecting forcibly into the ordinance an entirely new sentence, or possibly an entirely new section, declaring the two sections (11 and 12) to be mutually dependent on each other, and that if one is not performed the other shall be." But this evidences a complete misunderstanding of the Water Company's position. That position is that Ordinance 44 does not terminate, nor is it subject to termination, except at the time and in the manner therein expressly provided—to-wit, by the purchase of the waterworks system. In the absence of purchase, the ordinance rights continue. To terminate, the City must act affirmatively by purchasing. To continue the relation, the City need do nothing, except to refrain from pur-

chasing. This meaning is clearly expressed in the ordinance as written; no additional word, phrase, sentence or section is required.

On the other hand, to give to the ordinance the meaning now contended for by the City, the court must write therein a provision, now utterly lacking, to the effect that "all rights evidenced or conferred hereby shall cease, terminate and be at an end at the expiration of twenty years from the date hereof."

But it is said (Petitioners' Brief, p. 124) that the court may not compel the City to exercise its discretion to choose between alternatives; therefore a decree may not be entered requiring the City either to purchase or to renew. But counsel again ignore the obvious fact that no renewal, in the sense in which petitioners employ that word, is requisite. The Water Company's rights continue until terminated by purchase. The City has not purchased; therefore the rights are continuing. No renewal, in the sense of affirmative action on the part of the City, is required.

But the petitioners assert (pp. 124 and 125 of their brief) that section 20 of the ordinance evidences a contrary sense. We have hereinbefore discussed this section and its relation to the other parts of the ordinance, and upon that discussion submit that the City's contention in this regard is plainly without merit.

The petitioners' discussion of the doctrine of contemporaneous construction and estoppel will be found at pages 125-130 of their brief. No serious contention is made that these doctrines do not apply to a municipal corporation. Counsel say (p. 126):

> "We may well doubt whether contemporaneous construction may be applied to the case at bar;"

but no authorities are cited in support of this doubt, and we submit that none can be found.

Again counsel say:

> "One set of municipal officers might construe the contract in a certain way, but so long as no one was injured thereby, this would not prevent the City from later adopting another construction."

But we think we have demonstrated in a previous part of this argument that such a change of construction would inflict great and irreparable injury upon everyone concerned.

The real argument of petitioners in this regard seems to be that, conceding the applicability of the doctrine to a municipal corporation, the facts presented by this record do not justify its application.

The South Denver lease is commented upon, and it is suggested that the City might purchase the Company's interest in the South Denver plant without also purchasing the other portions of the Company's plant, although it is admitted that this is highly improbable. But the significant thing about the South Denver lease is that in case the City did not purchase the Company's interest in said plant on April 10, 1910, the City was obligated to grant a new franchise pertaining to the territory formerly embraced in South Denver,

> "upon the same terms specified in Ordinance 44 of the Series of 1890 of the City of Denver, the rates to be charged under such ordinance or franchise to be the same as charged during

> the term of said franchise in other parts of the City of Denver, and any restrictions, limitations or conditions that may be imposed upon the said The Denver Union Water Company, its successors or assigns, at that time shall apply equally and be made a part of the franchise proposed to be granted in said territory." (Printed Record, p. 212.)

Inasmuch as said proposed franchise was to operate from and after April 10, 1910, it is clear beyond question that in 1894 the City supposed that Ordinance 44, Series of 1890, would be in effect in other parts of the City subsequent to April 10, 1910, unless the City had purchased the Water Company's plant; for the proposed ordinance relating to South Denver, and to be effective from and after April 10, 1910, was to be "upon the same terms specified in Ordinance No. 44 of the Series of 1890," and the rates to be charged were to be "the same as charged during the term of said franchise in other portions of the City of Denver."

Petitioners in their brief make no reference to the formal opinion of the City's legal department expounding Ordinance 44, nor do they in any manner refer to the allegations contained both in the bill and in the cross-bill, and the averments set forth in the affidavit of Mr. Robinson, all undenied, and to the effect that the City has from the first, not only by the South Denver ordinance and by the formal opinion of its legal department, but otherwise, announced its construction of Ordinance 44, Series of 1890, and its understanding of its terms to be the same as that of

complainant and cross-complainant, and to the further effect that the construction and understanding thereof by complainant and cross-complainant has at all times been known to and acquiesced in by the City. Upon this point the only suggestion made is that Ordinance 163, Series of 1907, indicates a different construction. That it does not do so is, we submit, manifest. It is said that the latter ordinance was intended to create a new contract in place of Ordinance 44 of 1890. But to answer this contention we have only to point to the provisions of section 8 of Ordinance 163 (Printed Record, p. 164), wherein all rights under Ordinance 44 are expressly preserved, and it is agreed that—

> "all the rights, privileges and franchises of either party hereunto, provided for or contained in and by the terms of said contract and ordinance [44 of 1890] shall be and remain in full force and effect the same as if this contract and agreement had not been entered into, and none of the proceedings herein provided for had been taken."

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7. *The Limitation, Impairment or Restriction of Power of City to Acquire a Municipal Plant Is Neither Involved Nor Controlling in This Suit.*

It is not contended that the power of the City to acquire or construct a competing municipal water plant has been contracted away or limited, except that it must in such a matter proceed legally, and cannot attach, at the end of a charter section which does impair the obligation of a contract, a provision for building a municipal plant.

Scattered generally through the brief on behalf of the City are assumptions and statements that this suit has for its sole object the prevention of the construction of a municipal water plant, and that the challenged actions of the City, which are the foundations of this suit, were directed entirely to an exercise of its power to construct a municipal plant.

Section 264a and Ordinance 98 of 1910 were the immediate cause of this litigation, because they attempted the impairment of a contract, and were otherwise unconstitutional and invalid. Section 264a is as follows:

"EXHIBIT C.

(CHARTER AMENDMENT SECTION 264A.)

Section 264-a. Nothing in the preceding sections or in this charter, except as herein specifically provided, shall apply to the acquisition or operation of a water works or supplying the City and County of Denver and its inhabitants with water for all uses and purposes, but a public utilities commission is hereby created, to consist of three members, to have complete charge and control thereof, and to have and exercise all the powers given to the board of public works in Chapter IX, as to all public utilities. Except as herein provided, each member of said commission shall be elected for a term of six years and shall serve until his successor is elected and qualifies, and his salary shall be four thousand dollars per annum, payable in equal monthly install-

ments by the treasurer out of the general fund upon the warrant of the commission, and Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows are hereby elected as the first members of said commission to serve in the order named, from the date of their election to June 1, 1912, June 1, 1914, and June 1, 1916, respectively, and until their successors are elected and qualify. The names of all candidates hereafter nominated for members of said Commission shall appear on the official ballot without any party designation in connection therewith. Each commissioner shall give bond in the sum of $10,000 in the manner provided in section 152 of the charter. Said commission shall have power to employ a secretary and such legal and technical help as it may deem necessary, and shall, subject to the civil service provisions of this charter, hire all other employes, and shall fix and pay all salaries and wages and shall fix and collect all rates and charges for any service under its control, which rates and charges shall be made as low as good service will permit. Said commission may adopt reasonable rules and regulations with reference to such service. It shall make an itemized monthly statement of all moneys received and paid out by it, a copy of which it shall file with the city auditor, and shall daily turn over to the city treasurer, as provided in section 260, the money received by it, said money to be paid out by the treasurer only upon the warrant

of said commission. Said commission shall have and exercise all the powers of the city and county granted in the constitution or named in the charter in the matter of constructing, purchasing, condemning and purchasing, acquiring, leasing, adding to, maintaining, conducting and operating a water plant or system for all uses and purposes and everything pertaining or deemed necessary or incidental thereto. It shall institute and defend all litigation affecting its duties and powers or in relation to its trusts and all expenses thereof shall be paid by the treasurer out of the general fund upon the warrant of the commission, and it may also call to its assistance the city attorney or any other department of the city government. Except as in this section provided, the city and county shall never purchase or acquire or exercise any option, right, privilege or power of purchasing or acquiring any water plant or system from any person, persons or corporation except upon a vote of the qualified electors first had and obtained authorizing the same, and wherever in any ordinance or contract the former City of Denver was given the right, or the city and county now has the privilege or power to purchase or acquire any water system or plant or to extend any contract with reference thereto, the term 'city' used in any such ordinance or contract shall be taken and held to mean the qualified electors of the city and county and not otherwise. No plant owned,

acquired or constructed by the city and county and no water rights owned or acquired by the city and county shall ever be sold, leased or otherwise disposed of except upon a vote of the qualified electors first had and obtained, and the same shall be under the sole control and management of said commission. Any member of said commission may be recalled and his successor named at any time in the manner provided by the recall section of this charter. Any vacancy shall be filled by the remaining members of the commission and such appointee shall serve until the next municipal election and until his successor is elected and qualifies. Upon a vote of the taxpaying electors authorizing the same, as hereinafter provided, the City and County of Denver shall and it does hereby authorize the creation of an indebtedness in the sum of eight million dollars to provide a municipal water plant or system and everything incidental or necessary thereto for supplying the city and county and its inhabitants with water for all uses and purposes, said indebtedness to be evidenced by its bonds of the par value of eight million dollars, in convenient denominations of not more than one thousand dollars each and bearing four and one-half per centum interest per annum of such date and in such form and maturing at such times as may be prescribed by said commission. The council shall pass such ordinances as said commission may deem necessary respecting the issu-

ance of said bonds or to the full exercise of all the powers given it, in the form recommended by the commission, and without amendment, and the mayor shall sign the same. Said commission shall issue said bonds only from time to time as they are required for actual use or sale, and the mayor shall sign them and the clerk shall sign and attest them under the seal of the city and the auditor shall register them, with the approval of the president of said commission endorsed thereon. No such bonds shall be used or sold at less than par, nor sold except after advertisement as in this charter provided for the sale of public improvement bonds, and they may be called for redemption and redeemed by the commission in like manner as provided in section 314. If The Denver Union Water Company shall place in escrow with the Continental Trust Company of Denver, on or before July 1, 1910, a good and sufficient deed of conveyance from said water company to the City and County of Denver for all the property of every description included and embraced in the appraisement made under Ordinance 163, series of 1907, free and clear of all liens, encumbrances, claims and demands of every kind and character, accompanied by a valid surrender and release of any and all rights, claims and demands said company or any of its subsidiary, associated or affiliated companies may have against the city and county or against any of said property, with direc-

tion in writing to deliver the same to said commission in exchange for seven million dollars of said bonds at par, then the commission shall file its acceptance with said trust company and the same shall constitute a binding contract of purchase. In that event then at a special election which the council shall call within sixty days after the adoption of this amendment, to be held on the first Tuesday in September, 1910, there shall be submitted to the qualified taxpaying electors the question of issuing the said eight million dollars in bonds, of which seven million dollars at par shall be delivered to said trust company as aforesaid and the other one million dollars of bonds, or so much thereof as may be deemed necessary, shall be sold or used by the commission to improve, repair and add to the water plant so purchased. The ballot shall have printed on it the words 'For the issuance of Eight Million Dollars in bonds for the Purchase and Repair of the existing Water Plant under the provisions of section 264-a of the Charter,' and on a separate line the words, 'Against the issuance of Eight Million Dollars in bonds for the Purchase and Repair of the existing Water Plant under the provisions of section 264-a of the Charter,' with a space opposite each such line in which the voter may make his mark indicating his vote. In case The Denver Union Water Company shall fail or refuse to fully comply with all the foregoing provisions as to the things to

be done and performed by it, then at the special election aforesaid in lieu of the foregoing question, there shall be submitted to the qualified taxpaying electors on the ballot the question of issuing eight million dollars in bonds to be sold or used to construct and put into operation a complete system of water works for supplying said city and county and the inhabitants thereof with water for all uses and purposes. Said ballot shall have printed on it the words, 'For the issuance of Eight Million Dollars in bonds for the Construction of a new Municipal Water Plant,' and on a separate line the words, 'Against the Issuance of Eight Million Dollars in bonds for the Construction of a new Municipal Water Plant,' with a space opposite each such line in which the voter may make his mark indicating his vote. Such bonds, or so much thereof as the commission may deem necessary, shall be sold or used, by it to construct and put into operation a complete system of water works for supplying said city and county and its inhabitants with water for all uses and purposes, and said commission shall forthwith proceed to construct the same. The said commission shall, immediately upon its election, in case The Denver Union Water Company has not accepted the seven million dolars in bonds for its plant as aforesaid, proceed to make a careful investigation of the value of said plant for the uses and purposes of the City and County

of Denver and its inhabitants, and also proceed to make a careful estimate of the cost of constructing a complete new water system for the City and County of Denver and the inhabitants thereof and may submit an alternative bond proposition at said special election for the issuance of bonds in such sum as it may deem advisable for the acquisition or construction of a water plant or any part thereof by any of the ways within its powers herein mentioned, and the same shall be placed on said ballot in such form as said commission may determine, and it may also submit any proposition concerning its powers or trusts at any municipal election in like manner. If a majority of the votes cast thereon shall be in favor of any proposition submitted it shall thereby be adopted, and in case alternative propositions are submitted, and each receive a majority, then the one receiving the greater affirmative vote shall be the one adopted. Such adoption shall be a sufficient authorization for the issuance of the bonds thereby provided for and the same, when issued, shall be and constitute an indebtedness of the City and County of Denver for the purposes aforesaid, and the provisions in this section relative to the issue, sale and redemption of bonds shall apply thereto. Any provision of the charter in conflict herewith is hereby repealed."

The major portion and principal object of this section related to the acquirement of the plant of the Water Company at $7,000,000, despite the recent appraisal under Ordinance 44 of 1890, participated in by the City, fixing the value on the same property at $14,400,000.

At the end of this section, and attached as a most apparent threat, was the alternative of the construction of a municipal plant. The conditions would be entirely different if section 264a contained *only* provisions for constructing a municipal independent plant, and counsel for the City proceed upon the unjustified assumption that this is the condition.

Power in a municipality to erect its own plant is one thing, and the legal exercise of it a very distinct one. The Water Company has never claimed in this litigation that the City by Ordinance 44 of 1890, or any other contractual relation, had limited or impaired the municipal power to construct a water plant. Assuming that the Trust Company is right that the City has, under Ordinance 44 of 1890, or 163 of 1907, purchased, or elected and obligated itself to purchase, the water plant, it may be possible that the City has not exhausted its power to acquire another plant. (This assumption, however, requires an affirmative answer to the query as to whether or not the City has power sufficiently broad to enable it to acquire contemporaneously two complete independent, efficient and satisfactory water plants for the purpose of supplying its inhabitants with water.) Or, assuming that the City is obligated under Ordinance 44 of 1890 not to purchase, but to continue its contract obligations, as contended for by the Water Company,

the City might assert that, while recognizing the right of the Water Company to continue its business, and even recognizing the continuing obligations of the City to pay periodically sums due for hydrant rental, still the *power* to erect a municipal plant was intact and could be exercised even though the Water Company had a legal remedy for any breach of its contract with the City. An existing, unlimited power of a city to erect a municipal plant does not exclude *ipso facto* an obligation by the city either to buy a plant from the water company or to continue a contract with it; and whenever the city attempts to exercise this power of erecting a plant, it may not at the same time and by the same act deliberately impair a contractual obligation, nor may it proceed in a manner otherwise unconstitutional or invalid, and which irreparably damages the water company. If the obligation of contract is impaired, or the method of acting is unconstitutional and invalid, this is not aided by the mere assertion that an attempt is likewise being made to erect a municipal plant upon unquestioned power to do so.

The specious arguments on behalf of the City that a determination concerning municipal power to erect a water plant would solve this litigation, are expressed concretely at pages 69-79 and 114-118 of its brief, and the following authorities cited.

Knoxville Water Co. vs. Knoxville, 200 U. S., 22.

Bienville Water Sup. Co. vs. Knoxville, 175 U. S., 109.

Skaneateles Water Co. vs. Skaneateles, 184 U. S., 354.

Hamilton Gas Light Company vs. Hamilton City, 146 U. S., 258.

Stein vs. Bienville Water Supply Co., 141 U. S., 67.

Joplin vs. Light Company, 191 U. S., 150.

Bienville Water Supply Co. vs. Mobile, 146 U. S., 212.

Helena Water Works Co. vs. Mobile, 195 U. S., 383.

Vicksburg vs. Water Works Co., 202 U. S., 453.

Long Island Water Sup. Co. vs. Brooklyn, 166 U. S., 685.

Water, Light & Gas Co. vs. Hutchinson, 207 U. S., 385.

Newburyport Water Co. vs. Newburyport, 193 U. S., 561.

Donahue vs. Morgan, 24 Colo., 389.

Los Angeles vs. Los Angeles Water Co., 177 U. S., 558.

Freeport Water Co. vs. Freeport, 180 U. S., 587.

Home Tel. Co. vs. Los Angeles, 211 U. S., 265.

Leadville vs. Sewer Co., 47 Colo., 118.

We presume this represents the full array of authorities which may be mustered in favor of any possible assertion that a city retains undiminished municipal power to construct a water plant, unless the power and the act thereunder are clearly to the contrary. We concede to these authorties the fullest

effect for which even counsel for the City can contend, and yet none will be found which uphold the right of the particular municipality to proceed in an unconstitutional or illegal manner; or, under the guise of providing itself with a municipal plant, to deliberately impair other contractual obligations.

The general principle is easily deduced, and consistently repeated and applied, that the municipality will only have its power to supply itself through a municipal plant affected when this expressly appears and the power to so curtail it is likewise expressed. In the Knoxville case this court held that even an express provision "not to grant to any other person or corporation any contract or privilege to furnish water to the City of Knoxville" was not sufficiently broad or expressive to debar the city itself from constructing a competing plant. This case would only be applicable if in Ordinance 44 of 1890 there were a similar exclusive feature and the Water Company was contending that it was broad enough to absolutely preclude the City on its own behalf from erecting a water plant. It was this exclusive feature which the Knoxville Water Co. claimed was impaired by a law of the city of Knoxville, and when this court determined that no contract existed which precluded the city from erecting the plant, there, of course, could be no impairment. The constitutionality and validity of the law there objected to was not attacked upon any other ground, and seems to have been conceded.

Of the three Bienville Water cases, *supra*, one—141 U. S., 67—turned entirely upon a contract containing an exclusive feature, which, however, confined this to a particular source of supply, and the exclu-

siveness was, under the terms of the contract, limited to a particular place. In none of these cases was anything more than the power of the municipality to erect a plant in question. There were no rights asserted and alleged to be impaired, separate from the one which asserted a contractual limitation on the municipal power.

In the Skaneateles case all contractual relations had concededly expired. The validity and regularity of the municipal proceedings were unchallenged, except as it was claimed they offended against the implied exclusion of municipal competition. It was contended by the water company in that case that, merely because the village had consented to the construction of its plant, an implication arose against municipal competition. The village was not attempting to impair the contractual obligation, or to deprive the water company of its property, or to proceed in an irregular or illegal manner.

In the Hamilton Gas Light case the company had accepted a charter which contained express reservations of broad powers to change and modify its terms, and, later, statutory authority plainly conferring the right on the city to build gasworks was upheld and construed as plainly within the charter reservation. The court, in fact, does not seem to have given much consideration to the character of the contractual relation between the municipality and the gas company, but rather to have considered the relations which existed between the light company and the state under its charter of incorporation. Other contractual or property rights were in no manner involved, nor was the regularity of municipal proceedings.

In the Joplin case it does not appear that the light company had a contract to supply the city of Joplin with light, or that there was any contractual arrangement concerning the purchase of the plant, or, in fact, any contractual relation whatsoever, except that the light company should be allowed to construct its plant and to supply the inhabitants of the city of Joplin, and evidently at rates which were not fixed.

The city, therefore, was not attempting to disturb the right of the light company to use its property and carry on its business, except as this was implied from a contention that the city of Joplin, by conferring such rights on the light company, had thereby excluded itself from engaging in a like business.

Mr. Justice McKenna, in the course of the opinion, and referring to the Skaneateles case, noted the difference between these contract rights, saying:

> "The village of Skaneateles had entered into a contract with the Water Company to take water from the Company. This contract had expired before the city constructed its works. *It was not that contract, however, which was alleged to have been impaired, but that which the Water Company claimed to have been implied by reason of its organization and incorporation and in pursuance of the obligation made to and with the consent of the village authority.*"

There are, in our case, other contract rights not at all connected with the one which might exclude the City from competition.

In the Helena Water Works case the ordinance contained this provision:

> "That nothing herein contained shall be so construed as to give to the said Helena Consolidated Water Works Company, or its successors or assigns, the exclusive right of occupying the streets, avenues, alleys and public grounds of said city, with water mains and pipes, or the exclusive right of conveying, distributing or selling the same throughout the said city, or of furnishing the same to said city except as hereinafter set forth."

The contract for supplying the city with water was limited to five years, and had expired at the time the city attempted to construct its own plant. By stipulation, all question concerning the regularity of the proceedings on behalf of the city was excluded.

Under these circumstances it is clear that the only contract involved was an implied one that the mere grant of the franchise precludes the grantor city from entering into competition with the water works company.

The case of Vicksburg vs. Vicksburg Water Works Co., 202 U. S., 453, upheld the exclusive feature of a grant and precluded the city from engaging in competition, so that it can scarcely be cited as an authority on behalf of the City here; and, in fact, if there were any disposition on the part of the Water Company to claim an exclusive feature, the Vicksburg case would be strong authority; and as this decision was written by Mr. Justice Day, who

wrote the opinion in the Helena Water Works case, the distinction must have been substantial and controlling.

The Long Island Water case, 166 U. S., 687, involved only the exclusive feature as an element of value or damage in a condemnation proceeding. There were no terms of exclusion contained in the contract, and the court therefore, it seems, very properly excluded this as an element of value.

The Hutchinson case turns entirely upon the question of municipal power, the court saying, as to the exclusive feature:

> "The Circuit Court assumed that ordinance No. 204 was in terms exclusive, and was intended to be made so by the city. We shall assume the same thing. Indeed, it would be impossible to decide otherwise."

The city had power to confer the privilege of engaging in the light business, but only in the following language:

> "The privilege of furnishing light for the streets, lanes or alleys of said city for any length of time not exceeding twenty-one years."

It was held that such a general power did not include the right to confer a special privilege, the court saying:

> "A grant or power to confer such privilege is not necessarily a granted power to make it exclusive."

Again, it may be affirmed that no contract right was in dispute in this case, except the one which it was claimed excluded the city from competition.

In the Newburyport Water case, *supra*, the legislature, by a special act, made detailed provisions for the purchase of the waterworks by the city. The exclusive feature was only an incident in the decision of this case, and the court says:

> "Now, it is conceded that the Charter of the Water Company was not exclusive and was subject to repeal, alteration or amendment at the will of the legislature."

The claim was being made by the water company that its conveyance to the city was involuntary. As the legislature had not granted an exclusive right to the water company to supply the city of Newburyport, it could very properly have authorized the city of Newburyport itself to acquire a separate plant, and this would in no manner have deprived the water company of its property without due process of law. In fact, as the court says, a privilege or right was conferred upon the water company which the legislature need not have bestowed, and this privilege cannot be twisted into a burden or a deprivation of property. No contract rights of any character whatsoever existed or were interferred with between the water company and the city.

The three cases of Los Angeles Water Company, 177 U. S., 558; Freeport Water Company, 180 U. S., 587, and Home Telephone Company, 211 U. S., 264, deal entirely with the power of a municipality to

regulate rates, or by contract to part with or suspend such power in the hands of a public-utilities company.

The power to so do, it was held, must be expressly conferred on the municipality and must be expressly exercised by contract. The applicability of these authorities is not apparent.

The citation to the case of Donahue vs. Morgan, 24 Colo., 389, is also without pertinency. It was here held that the delegation of power to municipalities to contract for their own system of waterworks within or without its limits, or to grant a franchise to a private company, was divisible, and that the municipality might, as to a part of its territory, so provide for a supply by contract with a private company, and engage in municipal ownership in another portion of its territory. This being particularly true where, as in the case then in hand, there had been annexations of separate municipalities.

The above authorities shed no light whatsoever upon the question of an impairment of a contract to purchase a plant or to continue it, or as to the manner in which a city should act in order to construct its own water plant.

After a *seriatim* review of these authorities, we submit that they give us no assistance in the present matter, where an exclusive feature is not asserted; where the contract impairment is separate and distinct from an exclusive feature, either express or implied; and where the City is proceeding, in an unconstitutional and illegal manner, entirely separate and apart from any consideration of an exclusive feature.

8. The Contract Evidenced by Ordinance 44, Series of 1890, Was Within the Power of the City to Make.

By the charter of 1889, in effect at the time Ordinance No. 44 of the Series of 1890 was passed, the City was given in specific language the broadest possible powers in respect to providing the City and its inhabitants with water; and the section upon this subject concludes with the following sweeping language:

> "And generally to do whatever may be needful and necessary to be done in order to supply the City with water for fire, irrigating, domestic and other purposes, and regulate the same." (Session Laws, 1889, p. 128, sec. 9.)

Under this charter provision there can be no doubt whatever of the power of the City to enter into the contract evidenced by the ordinance, unless there was some other provision of the Constitution or charter limiting the same.

But in the year 1889 the following provision was inserted in the charter of Denver, and has been repeated in each succeeding charter:

> "Section 23. All franchises or privileges hereafter granted by the City of Denver to corporations or individuals shall be limited to twenty years from the granting of the same, and such franchises or privileges so granted shall plainly specify on what particular streets, alleys or avenues the same shall apply to; and no franchises or privileges shall hereafter be granted by the City of

Denver in general terms or to apply to the city generally."

It is insisted by the appellants that this charter provision was violated, because Ordinance 44 did not provide that it should terminate in any event at the expiration of twenty years. Prior to 1889 there had been no such limitation upon the powers of the City.

We premise this discussion by again calling the attention of the court to the distinction between the grant of street rights and the making of the contract for water service. These two subjects will be considered separately in reference to the effect of the charter provision of 1889.

(a) The twenty-year limitation does not relate to the contract.

In City of Denver vs. Hubbard, 17 Colo. App., 346, the Court of Appeals of Colorado was considering a contract between the City of Denver and an Electric Light Company, providing for the lighting of the streets of the City by the company for a term of years at a stipulated price per year for each light, with an obligation on the part of the City to use not less than a certain number. The contract was evidenced by an ordinance passed while the city charter of 1893 was in effect. This charter gave to the City the power, through its council, "to provide for lighting the streets and public grounds, and erecting lamp posts, electric towers or other apparatus" (Session Laws, 1893, p. 146); and also contained the same section relative to a twenty-year limitation quoted

above (Session Laws, 1893, p. 155, sec. 24). The contract was challenged as being beyond the power of the City, because its term was unreasonably long, and thereby it limited the legislative power and discretion of future city councils; but the court said (p. 365):

> "It is claimed that the City had no authority to contract for any term of years, beyond one, and that ten years is an unreasonable length of time. It is true that the city was not given by its charter power to contract for lighting for any term of years, *nor was it restricted or limited to any particular term.* In fact, the charter did not specifically give it power to contract at all—to enter into any contract for lighting. The specific grant of power was to provide for lighting. This was the power expressly granted, but under all authorities the city was authorized to exercise those powers necessarily or fairly implied in, or incident to it. As a business proposition, any city, in entering into a contract of this kind, is in the exercise of its business powers. It needs no argument to demonstrate that to carry out such a power it is absolutely necessary that the City should have the power to contract—provide terms and specifications—and this, whether it undertakes to provide for lighting by building a plant of its own or by entering into a contract or agreement with a company or individual to supply the light. There are no specific restrictions upon the right of the municipality to contract in the exercise of

this power, and there is no reason in such case why the city in the exercise of its business powers should not have the same right to contract as a natural person. Any other conclusion would be disastrous to the carrying on of the multifarious business affairs of the city, and as we have before said, it is a practical business impossibility for a City to carry out this power unless it does contract for some term of years. It has so far escaped our attention if there is a single case in the books among the vast multitude treating of contracts for lighting cities wherein the contract does not run for some term of years. As to the reasonableness of the term fixed, there being no express limit upon the power of a city as to time, the Court should not undertake to interfere with the judgment of the City Council, which is conversant with the needs and necessities of the City as well as existing conditions and circumstances to be considered in fixing the term of a contract, unless it is clearly made to appear that there has been an abuse of discretion."

This decision, being that of the highest appellate court of Colorado which has considered the matter, and relating, as it does, to the construction of the same charter provision here relied upon by the appellants, is conclusive and binding upon this court.

True, the foregoing decision was by the Court of Appeals of Colorado, but under the laws of Colorado

as they then stood, the Court of Appeals had final appellate jurisdiction over a large class of cases, and the case just cited fell within that class. In the absence of any decision of the Supreme Court of Colorado in conflict therewith, we submit that this determination of the Court of Appeals is conclusive and must be followed by the federal courts.

Hallinger vs. Davis, 146 U. S., 314, 316, 319.

In re Gilligan (C. C. A., 7th Cir.), 152 Fed., 605; 81 C. C. A., 595.

From the foregoing decisions of the Colorado appellate court we deduce that the twenty-year limitation contained in the city charter did not at all apply to the contract for service, but that such a contract could run for any term of years which the City Council might in its discretion consider wise and proper, "unless it is clearly made to appear that there has been an abuse of discretion."

Under the circumstances existing in 1890—the necessity of obtaining new capital in large sums, and of affording adequate protection to its investment, as described in the affidavit of Mr. Robinson (Record, p. 188)—no court can say that the discretion of the City Council was not properly exercised when it entered into the contract evidenced by Ordinance No. 44.

Illinois Trust Co. vs. Arkansas City (C. C. A., 8th Cir.), 76 Fed., 271, 282, 283.

New Orleans vs. Warner, 175 U. S., 145.

Fidelity Company vs. Fowler, 113 Fed., 560.

City vs. Yates, 104 Me., 506; 72 Atl., 335, 339.

Contracts for much longer periods, and containing terms much more burdensome to the city, have been upheld. In the following list of authorities, the figures preceding the name of the case indicate the duration of the contract:

60. Incorporated Town vs. Guinn, 5 Ind. Ter., 497; 82 S. W., 886.

50. California Reduction Co. vs. Sanitary Reduction Co., 126 Fed., 29.

Same case, 199 U. S., 306.

50. Minneapolis vs. Minneapolis Co., 155 Fed., 989.

50. Memphis Company vs. Williamson, 9 Heisk., 314.

31. Reed vs. Anoka, 89 Minn., 294; 88 N. W., 981.

30. Fergus Falls Co. vs. City, 65 Fed., 586.

30. Los Angeles Co. vs. City of Los Angeles, 88 Fed., 720.

Same case, 177 U. S., 579.

30. Little Falls vs. Little Falls, 102 Fed., 663.

30. Oconto Company vs. Oconto, 105 Wis., 76; 80 N. W., 1113.

30. Hurley vs. Vaughn, 115 Wis., 470; 91 N. W., 971.

25. Omaha Company vs. City of Omaha, 147 Fed., 1.

25. Walla Walla vs. Walla Walla Co., 172 U. S., 1.

25. City of Vincennes vs. Citizens' Company, 132 Ind., 114; 31 N. E., 573.

21. Illinois Trust Co. vs. Arkansas City, 76 Fed., 271.

In the foregoing cases the period was absolutely fixed, with no provision for its intermediate termination by purchase. If those contracts are reasonable, as the courts have held, can it be said that a contract is unreasonable which provides for its termination at the end of twenty years, upon purchase by the city of the physical property?

In City of Duluth vs. Duluth Gas & Water Co., 45 Minn., 210; 47 N. W., 781, a contract for water supply made exclusive for the period of thirty years, giving the city an option to purchase the works after the expiration of ten years, and requiring the city to purchase them at the expiration of thirty years, if it then should refuse to extend the privileges of the water company for another twenty years, was upheld.

In Stein vs. Bienville Water Supply Co., 34 Fed., 145, a contract made exclusive for the period of twenty years, but to continue hereafter as a non-exclusive privilege until the city should purchase the works, was upheld, and the decision affirmed by the Supreme Court of the United States (141 U. S., 67).

Contracts for periods longer than twenty years, and containing an absolute agreement on the part of the city to purchase the works at the expiration of the period, have been upheld.

National Water Works Co. vs. Kansas City (C. C. A., 8th Cir.), 62 Fed., 853.

Same case, 65 Fed., 691.

Los Angeles Co. vs. City of Los Angeles, 88 Fed., 720.

Same case affirmed, 177 U. S., 579.

Los Angeles Co. vs. City of Los Angeles, 193 Fed., 711.

We submit that under no circumstances can it be held that the contract made by Ordinance No. 44 of the Series of 1890 was invalid.

(b) The twenty-year limitation did not affect the street rights.

Since it has been conclusively determined that the twenty-year limitation did not apply to the contract for service, it had no application whatever, unless it related to the street rights of the Water Company. The language of the charter was that "all franchises or privileges hereafter granted * * * shall be limited to twenty years from the granting of the same," and shall plainly specify the streets, alleys or avenues to which they apply. It is possible that this language is sufficiently broad to relate to an original grant of street rights. But the language is "shall be limited." It is not said that the rights "shall terminate at the end of twenty years," nor is it said that such rights "shall not, under any circumstances, extend beyond twenty years." The use of the word "limited" has significance; its command is much less broad and drastic than either of the expressions suggested above, or many others that might have been used. We submit that a right or privilege is "limited

to twenty years," when at the expiration of that period the City has an absolute right and an absolute power of its own motion, and at its own uncontrolled will, to terminate it. And even the original grant of a right which may be thus terminated at the expiration of twenty years can properly be said to be "limited to twenty years." Therefore, the prohibition is not violated, even though Ordinance No. 44 of the Series of 1890 had made an original grant of street rights.

But the language of the charter prohibition is limited to new and original grants. The words are "all franchises or privileges hereafter granted." Ordinance 44 made no original grant of any new street rights. The Water Company already possessed street rights in the City of Denver, and all additions thereto, by virtue of previous grants made at a time when no such limitation of power existed in the charter. By its title the ordinance purported to be "an ordinance continuing and extending the franchise and privileges of the Denver Water Company;" and by section 19 of the ordinance,

> "it is expressly understood that by the acceptance of this ordinance the said The Denver Water Company loses no rights in regard to the occupation of the streets, alleys and public places, or as to the rights of any other person or persons thereto which it now possesses; but the same are hereby recognized and confirmed, and are to be deemed independent of and not merged in any grant in this ordinance elsewhere contained."

And by section 20 it was provided that—

> "The Denver Water Company, its successors or assigns, shall forever be considered and entitled to be in possession thereof [its mains, pipes and other property in the streets], except in case of purchase by said City under the terms of this ordinance, or some agreement between said City and said Company, its successors or assigns, when all rights, of whatsoever nature, of said Company, its successors or assigns, in and to the subject-matter hereof, shall vest in said City."

What was the situation as to street rights existing at the time of the passage of the ordinance? By the ordinance of 1870 the Company's predecessor had acquired the exclusive right to lay pipes "within the city limits of said City of Denver, and any additions that may hereafter be made thereto" (Record, pp. 358, 373). The ordinance of 1870 contained no time limitation. The ordinance of 1874 mentioned a period of seventeen years, but this related, as we contend, solely to the feature of exclusiveness. But if we assume, for purposes of the argument, the situation which under the law is the most unfavorable to which the Water Company could, in view of the facts, be forced; and if we assume that the street rights granted on December 16, 1870, were affected by the corporate life of the grantee, which was twenty years; or if we assume that the seventeen-year period mentioned in the ordinance of May 9, 1874, related to the street rights rather than the monopoly—still the re-

sult would be that the rights granted in 1870 remained irrevocable for the period of twenty years, and thereafter continued subject to revocation, or, in view of the seventeen-year period mentioned in 1874, that they remained irrevocable until May 1, 1891, and thereafter continued subject to revocation.

This is the most unfavorable light in which the court can possibly view the Water Company's street rights as they existed on April 10, 1910, under the doctrine announced in Omaha Electric Light Co. vs. City of Omaha, 179 Fed., 455. In that case the court, after deciding that the city of Omaha was without power to grant a perpetual street right, and after also deciding that a grant to a corporation, without mention of time limitation, was affected by the corporate life of the grantee, holds (p. 460):

> "We think the facts of this case, in the light of the foregoing authorities, disclose the intention that the company should have and enjoy the franchise in question, at least for the period of its corporate existence, and that its assigns or successors might thereafter hold and enjoy the same at the will of the city only."

And it has been frequently held that even where the ordinance contains a specific time limitation, the grant of street rights as well as the contract remain irrevocable for the period stated in the ordinance, but both continue thereafter subject to revocation.

> National Water Works Co. vs. Kansas City, 62 Fed., 852, 855, 862, 863.

National Water Works Co. vs. Kansas City, 65 Fed., 691, 696, 697.

Los Angeles Water Co. vs. City of Los Angeles, 103 Fed., 711, 714, 715, 736.

Farmers Loan & Trust Co. vs. City of Sioux Falls, 131 Fed., 890, 898.

It follows that on April 10, 1890, when Ordinance 44 was enacted, the Water Company, as successor to the original grantee, was the owner of street rights in all the streets of Denver, and any additions which might thereafter be made thereto, which street rights, at the very least, were irrevocable at any time prior to May 1, 1891, but which beyond question continued thereafter subject, possibly, to the City's right to revoke. But the command of the charter provision of 1889 did not require that all revocable street rights then in effect should be revoked within twenty years, nor did it require that all street rights then in effect, which might thereafter become revocable, should be revoked at once, or within twenty years, or within any period of time. The charter provision was not aimed at any existing right of any character, nor could it affect the same; it related exclusively to "all franchises or privileges hereafter granted." Therefore the street rights of the Water Company, viewed in the most unfavorable light, were not affected in any manner by the charter amendment of 1889, and they have never been revoked to this day.

But what was the effect of Ordinance 44 upon the right to revoke? We submit that by that ordinance the City, in the clearest terms and upon a valid consideration, agreed that it would not revoke those

street rights for the period of twenty years thereafter, and not then unless it purchased the Company's plant. The title of the ordinance, the provisions of section 14 relative to the free supply of water for certain municipal purposes, and the provisions of sections 19 and 20, evidence this intent beyond the possibility of a doubt. The question, therefore, recurs: Was a contract that certain existing privileges and rights, which thereafter might become revocable, should not be revoked for a period of twenty years, and not then except upon certain conditions, within the power of the City to make? Clearly, such a contract, under the circumstances, was a reasonable, proper and commendable exercise of the discretion of the City Council. Was it forbidden by the twenty-year limitation contained in the charter? We submit that it clearly was not. Under no possible construction of the language of the charter amendment could it apply to such a contract. The matter was determined by the decision of the Circuit Court of Appeals in McPhee & McGinnity vs. Union Pacific Railroad Co., 158 Fed., 1. In that case the court was considering a street right granted to the railroad company by the City Council, after the adoption of the present charter of Denver. Section 266 of the present charter contains the twenty-year provision in exactly the same language in which it was originally incorporated in the charter of 1889. The present charter also contains, in section 269, a provision that—

> "The council may grant a license or permit at any time in or to any street, alley or public place, provided such license or permit shall be revocable at any time, and such

> right to revoke shall be expressly reserved in every license or permit which may be granted hereunder."

The street right granted to the Union Pacific Railroad contained a provision that it should be revocable; but also provided that in case of revocation the City should repay to the railroad company the sum of $67,000, which it had expended in paving and sewering the street. It was strongly urged in the McPhee case that the grant to the railroad company was invalid, because it was a "privilege" in a street within the meaning of section 266, and was not limited to twenty years, but might continue thereafter; because it was not revocable at any time and without restriction, but could only be revoked upon condition, which condition was unreasonable; because, by reason of the condition attached to the right to revoke, the privilege might not, and probably would not, be revoked at all, in which event it would continue forever. But the court said, upon consideration of these charter provisions (p. 18):

> "But counsel for the appellants further contend that this license was beyond the powers of the City Council, because, though revocable by its terms, it was so incumbered by conditions that it will never be recalled. The answer is that the authority of the City to grant licenses of this character was not limited by the charter to those which would be revoked in fact within a limited time, or at any time, but to those which the City would have the power to revoke, and that,

while the prophetic vision to see when this license will be recalled has not been given, neither has the power to foresee that it will not be revoked been granted to the Court, so that its judgment may not be founded upon either prophecy.

Again, the power conferred upon the City Council by section 269 of the charter to grant licenses of this character was not limited to the granting of licenses unconditionally revocable, but it extended by its terms to the granting of all revocable licenses, those revocable upon conditions as well as those revocable without conditions. Moreover, there is no impossible or impracticable condition imposed upon the recall of this license. * * * The performance of the alleged condition is neither impossible nor impracticable. It is that the City, upon the recall of the license, or any part of it, shall repay to the Railroad Company the amount it has expended, not exceeding $67,000 in paving and sewering the part of the street which the revocation affects. * * * If this be a condition, it is neither impracticable nor burdensome, and the result is that the charter empowered the City Council to grant revocable licenses to any street, alley, or public place in the municipality. This license is revocable, and its grant was within the powers of the Council."

In Louisville and Nashville Co. vs. Bowling Green Co., 23 Ky. Law Rep., 273; 63 S. W., 4, 6 and 7, it was held that—

> "Where a Street Railroad Company, prior to the adoption of the present constitution, constructed its road over certain streets of the City, under an ordinance by which the City reserved the right to declare forfeit the right of way and privileges 'therein granted over such streets or parts of streets as said Company should not have occupied by constructing and operating a line of street cars as therein provided at any time after five years from the passage of the ordinance,' no forfeiture having been declared by the City, the Company had the right after the adoption of the constitution, and more than five years after the passage of the ordinance, to extend its line over other streets and parts of streets named in the original ordinance, without becoming the highest and best bidder for the privilege, as required by Const., sec. 164, as the grant was an entirety, and the constitution did not repeal any part of it; work having been begun thereunder prior to the adoption of the constitution."

And in Brummitt vs. Ogden Water Works Co., 33 Utah, 289; 93 Pac., 828, the court was considering a constitutional provision which forbade any municipal corporation from directly or indirectly leasing any water rights or sources of water supply controlled by it, and required all such rights to be preserved,

maintained and operated by the municipal corporation for supplying its inhabitants with water at reasonable rates.

> "Prior to the time the constitution went into effect a City had made a contract purporting to lease certain water rights to one who agreed to construct and operate a system of waterworks to supply the City, etc., under which the lessee was to furnish certain free water to the City. After the constitution was adopted the City passed an ordinance regulating its relations with the Company, which succeeded to the rights of the lessee in which some changes in rates, etc., were made, and this ordinance granted to the Company the use of the water rights for a term of fifty years as a part of the arrangement; but the city was still to receive considerable water for public purposes free of charge. Held, that the ordinance was in effect a mere continuance of the former contract, and the disposition of the city's water right was valid."

(c) *Petitioners' contentions in this regard.*

But counsel for petitioners assert that, even though upon its face Ordinance 44 contained no words which *ex vi termini* would cause rights thereunder to terminate on April 10, 1910, yet the provision of the charter of 1889 imposing the twenty-year limitation must be read into the contract. But this is certainly not true; for the charter provision

has no effect, unless it be a limitation on the power of the council; and that it was not such limitation in the instant case we hope we have demonstrated by the preceding discussion.

But counsel for petitioners argue (pp. 105-114 of their brief) that the contract was beyond the power of the City, because there was no express grant of power to the City to contract in 1890 that it would in 1910 purchase a water plant. The argument is that, since there was no express delegation of this power, and since, as counsel maintain, it was not essential or indispensable to the power which the City had to supply itself and its inhabitants with water, therefore the contract was *ultra vires*. But this contention invokes a doctrine of strict construction as applicable to the powers of a municipal corporation, which has never been carried to the extent now urged by counsel, and which, we submit, is inapplicable to the instant case.

The record here shows without dispute that it was impossible for the City in 1890 to obtain the requisite supply of water for itself and its inhabitants without entering into the agreement containing the stipulations in question, and these stipulations were of that class which this court has said are "designed to do little more than bind the City to carry out the contract in good faith and with decent regard for the rights of the other party."

> Vicksburg vs. Waterworks Co., 202 U. S., 453, 468.
>
> Walla Walla vs. Walla Walla Water Co., 172 U. S., 1, 18.

And in each of the cases cited above, although there was an express provision prohibiting the city from making an exclusive contract, this was held not to forbid, expressly or impliedly, a contract by the city not to itself compete, and the contracts were in each instance sustained, notwithstanding that the one in the Vicksburg case purported to confer an exclusive right and privilege, and contained no express agreement that the city would not compete. It would appear that in these two cases the court has refused to apply to the powers of the city a doctrine of strict construction, lest it interfere "with limitations designed to do little more than bind the city to carry out the contract in good faith and with decent regard for the rights of the other party."

But the question as to whether the City was empowered in 1890 to enter into a contract whereby it agreed absolutely and at all events to purchase the Company's property in 1910, is one which does not concern the Water Company. We submit that beyond question the City was empowered to enter into a contract such as that evidenced by the terms of Ordinance 44 of 1890, and to then agree that it would not terminate such contract at the end of twenty years unless it at that time purchased the plant. Such an agreement stands upon a different foundation and has different effect.

In Clay Center vs. Light & Power Co., 78 Kan., 390, cited at page 112 of petitioners' brief, the court was considering a statute of Kansas which expressly forbade the city to enter into any contract for the furnishing of light for its streets for a period exceeding twenty-one years. In the instant case we are con-

fronted with no such prohibition, and the council had undoubted power, as declared by our Court of Appeals, to enter into such contract for any period of time which in their discretion might be considered wise.

The fact that the Clay Center case was appealed to the Supreme Court of the United States, and the appeal there dismissed, is of no importance; for it appears that the dismissal occurred by reason of the fact that the federal question involved was first raised by the petition for rehearing in the Supreme Court of the state. (212 U. S., 564.)

But it is contended, at pages 114-118 of petitioners' brief, that Ordinance 44 is void, because its effect is to restrict the City's power to provide itself with a water supply, by limiting such supply to one particular company, and that the grant of power to limit itself in this respect and the exercise of the power must both appear expressly or by necessary implication; but this contention is negatived by the decisions of this court in the Walla Walla and Vicksburg cases. above cited, in both of which the city had restricted itself expressly and agreed to refrain from municipal competition, notwithstanding that there was no express grant of such power. Moreover, the argument supposes an assertion upon the part of the Water Company of an exclusive right, which assertion the Water Company does not now make, and has not at any stage of these proceedings made.

But the sole answer made by petitioners to the Water Company's argument respecting the twenty-year limitation is found at pages 189-191 of their brief. Speaking of the Water Company's contention

as it was made in the lower courts, and as it is reiterated in the preceding pages of this brief, counsel say: "We doubt if its argument on that point will commend itself to this court." And as a basis for this doubt, but without further argument or amplification, counsel assert in effect that they may safely concede, first, that the twenty-year limitation does not apply to the contract for water service; second, that such limitation likewise does not apply to the Water Company's street easements; yet, they say that the franchise granted in 1890 by Ordinance 44, and to which the limitation did apply, is "the right to do business in the city, the right to supply the city and its inhabitants with water, as distinguished from the contract made with the city for the municipal supply at a certain rental for hydrants, and from the contracts made with each individual consumer." And this right, they say, having been unquestionably limited by the charter of 1889 to the period of twenty years, absolutely ceased on April 10, 1910, and that since said date the Company has no longer any right whatsoever to carry on business within the city limits, either with the City itself or with any of its inhabitants. Upon this ground alone counsel seek to overcome the argument of the Water Company respecting the validity of Ordinance 44 and the power of the City to enter into said contract.

In making this contention, counsel utterly ignore the fact that under the laws of Colorado, as is true under the laws of most states, the right to be a corporation, and the right as such corporation to carry on any lawful business, including the business of selling water service either to a municipal corporation or to

the inhabitants thereof, are rights granted directly by the state and acquired through the act of incorporation. This was true in 1870, when The Denver City Water Company was organized; it was true in 1882, when The Denver Water Company, the beneficiary named in Ordinance 44, was incorporated; it was true in 1894, at the date of the incorporation of The Denver Union Water Company, cross-complainant and respondent herein; and it is true today.

Revised Statutes of Colorado, 1868, pp. 117, 118; secs. 1, 2.

General Laws of Colorado, 1877, pp. 143, 144, 145; secs. 191-194, inclusive.

General Statutes of Colorado, 1883, pp. 180, 181; secs. 238, 240.

Revised Statutes of Colorado, 1908, pp. 362, 363; secs. 847, 854.

A water company, having received the requisite authority from the state, could undoubtedly conduct its business within the limits of the City of Denver. If the business could be done without placing apparatus in the streets, it would be wholly unnecessary to obtain any license or consent from the local authorities. If the necessary right of way could be obtained over private property by grant of the owners thereof, or through the streets by conveyance from some other company which had previously received it from the City, it would be equally unnecessary to approach the City upon any subject connected with the doing of the business. It might be considered an added advantage to have a definite contract with the City relative to furnishing water for municipal purposes; it might also be considered an additional advantage to have a

contract with the City relative to the charges which might be made to private consumers; but these are nonessentials and do not pertain to the right to do business.

These thoughts were never more clearly expressed than in the decision of Mr. Justice Lurton (then a circuit judge) in Detroit Citizens Street Ry. Co. vs. City of Detroit, 64 Fed., 628, the doctrine of which has received the complete approval of this court in repeated decisions, as appears from a previous portion of this argument. (See *supra*, I, 2, pp. 23, 31.)

The limitation imposed by the charter of 1889 was upon the City of Denver, and not upon the State of Colorado; therefore it had no application to the grant of the right to be a corporation, nor to the grant of the right to carry on business as a water company within the City of Denver, to furnishe water to those who chose to take it, whether it be the City itself or any or all of the inhabitants thereof, and to take tolls therefor. These rights were granted directly by the state, and are in full force and effect. The provisions contained in the articles of incorporation of The Denver Union Water Company in this respect are set forth in the cross-bill (Printed Record, p. 112).

Counsel in this connection cite *New Orleans Gas Co. vs. Louisiana Light Co.*, 115 U. S., 650, and *New Orleans Water Co. vs. Rivers*, 115 U. S., 674; but in both of these cases the legislature of Louisiana had itself made all of the grants involved—to-wit, the grant of the right to be a corporation, the grant of the right to carry on the business in question within the city of New Orleans and to take tolls therefor, and also the grant of the right to occupy the streets of said city. It would seem to be unnecessary to indicate the

distinction between such cases and the case at bar, where the state still reserves to itself the power to grant the primary franchises, and has delegated to the municipality only the right to grant the street easement. These distinctions are clearly pointed out by Judge Dillon.

Dillon on Municipal Corporations (5th Ed.), sec. 1304, p. 2136.

Upon the foregoing discussion we submit (1) that the contract provisions of Ordinance 44 were a reasonable, proper and commendable exercise of the discretion of the City Council, were not affected by the twenty-year limitation contained in the charter, and are therefore valid; (2) that the street rights of the Water Company, even if they had been originally granted by Ordinance 44, were effective for a period of twenty years thereafter, and, unless the City then purchased the works, for an additional period of twenty years, because thereby they were "limited to twenty years;" (3) but that in any event the twenty-year limitation did not apply to the Water Company's street rights, because Ordinance 44 was not an original grant thereof, but constituted nothing more than a contract on the part of the City that an existing and continuing right which might in the future become revocable, should not be revoked for a period of twenty years, and not then unless the City purchased the works, which contract was reasonable, within the power of the City to make, not controlled by the limitation contained in the charter of 1889, and not violative thereof.

9. Street Rights and Contracts in Former Municipalities Now Included in City and County of Denver.

The present City and County of Denver is a municipal corporation created by the adoption of Article XX of the Colorado Constitution. It embraces within its limits a number of municipal corporations, which, by the consolidation authorized and effected through the adoption of the constitutional amendment, became portions of the enlarged municipality. But prior to this consolidation these independent municipalities had made various grants of street rights, and entered into various contracts in respect to water supply with The Denver Union Water Company and with its predecessor companies. All of these rights and contracts, as well as the physical property used in their exercise and performance, had fallen to the ownership of The Denver Union Water Company, and these plants had become integral and inseparable portions of the enlarged system owned and operated by the latter company. (See original bill, pp. 4, 9, 12; cross-bill, pp. 120, 121.)

A complete account of the various grants by and contracts with the former municipalities now included in the City and County of Denver is set forth in the affidavit of Mr. Robinson, at pages 181-187 of the record. It there appears that in many instances the contract for water service is still in full force and effect, and few, if any, of the street rights have expired. And from the affidavit of the engineer, Mr. Thomas, it appears that the water plants situate in the former municipalities have been incorporated into the larger system of The Denver Union Water

Company, and much money expended thereon, of which a large sum has been expended since April 10, 1910 (pp. 233-235).

By said Article XX of the Constitution it was provided that the City and County of Denver "shall succeed to all the rights and liabilities, and shall acquire all benefits, and shall assume and pay all bonds, obligations and indebtedness of the City of Denver and of said included municipal corporations" (Revised Statutes of Colorado, 1908, p. 56).

By Article XIV, section 348, of the charter adopted pursuant to said constitutional amendment, it was provided that "all rights, liabilities, obligations, suits, actions, prosecutions, claims and contracts of the City of Denver, the former County of Arapahoe, the included municipalities, and the City and County of Denver shall remain and continue in full force and effect as if the former government had not been changed and this charter adopted."

By the ordinances of 1870 and 1874, street rights were granted as to all streets within the City of Denver, and "any additions that may hereafter be made thereto." This grant was confirmed by Ordinance 44 of the Series of 1890, sections 19 and 20. By virtue of this language, the street rights extended not only to the original platted area of the City, but also to all unplatted areas within or without the city limits, which might thereafter be platted and become additions to the City.

Dillon Mun. Corp. (5th Ed.), sec. 1304, p. 2143.

People vs. Deehan, 153 N. Y., 528.

Grand Rapids vs. Grand Rapids Co., 66 Mich., 606; 33 N. W., 749.

Seattle Lighting Co. vs. City of Seattle, 54 Wash., 9; 102 Pac., 767.

But the annexation of any formerly independent municipality, or its inclusion by consolidation within the greater City and County of Denver, did not in any manner affect either the contract for service or the grant of street rights theretofore made by the independent municipality.

City of Denver vs. Denver Union Water Co., 41 Colo., 76, at 106.

The various independent municipalities were organized under the general act relating to towns and cities, and possessed ample powers both to make contracts for water service and to grant street rights to water companies.

2 Mills Ann. Stats., sec. 4403, paragraph Seventh, subdivisions (1st), (3rd) and (7th), and paragraphs Sixty-seventh, Sixty-eighth and Sixty-ninth.

The limitation of twenty-five years contained in paragraph Sixty-ninth related to the contract for service, but not to the street rights.

City of Denver vs. Hubbard, 17 Colo. App., 346, 367.

Pike's Peak Power Co. vs. City of Colorado Springs (C. C. A., 8th Cir.), 105 Fed., 1, 10.

Sharp vs. City of South Omaha, 53 Neb., 700, 74 N. W., 76.

Hester vs. Town of Greenwood, Ind., 88, N. E., 498.

It follows that within the territory formerly embraced in the independent but now included municipalities, The Denver Union Water Company has contracts for water service not yet expired, and by which, for a period of years, it is obligated to maintain and operate, and for that purpose make use of, large portions of the entire water plant. And it also has, by independent grant, street rights covering large areas of the territory embraced within the City and County of Denver. The pipes and other apparatus situate in what were formerly independent municipalities are so connected with and dependent upon those portions of the waterworks system located in what was formerly the City of Denver, that in order to operate the works and fulfill the contract obligations relating to large portions of the present City, it is essential that the entire plant remain in the possession of and be operated by the Water Company.

Omaha Water Co. vs. City of Omaha (C. C. A., 8th Cir.), 162 Fed., 225.

City of Omaha vs. Omaha Water Co., 218 U. S., 180.

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10. Acts of the City and Its Officers, Which Are Complained of.

(a) General discussion.

The appraisers selected to value the property of the Water Company were disinterested men of the highest character, standing at the head of their pro-

fession, and eminently qualified by training and experience to perform the duties which they assumed (Record, p. 13). They reached their conclusion as to value after a most careful and painstaking inquiry (Record, p. 14). On March 20, 1909, they announced their finding, to the effect that the value of the property as of the date of said appraisement was the sum of $14,400,000 (Record, p. 15). Eighteen months intervened between the return of said appraisement and the commencement of this suit. April 10, 1910, had come and gone, but the City did not at any time prior to the expiration of the twenty-year period take any further steps to complete said purchase of or payment for the waterworks at said appraised value, nor has it done so to this day; but, on the contrary, not only unofficially expressed its intention not to proceed further to complete said purchase, but officially, by virtue of an alleged amendment to the charter—to-wit, said section 264A—declared its intention of not proceeding further with said purchase under said appraisement, but of erecting an independent, complete and competing waterworks system for the supplying of water to the City and County of Denver and its inhabitants for all uses and purposes, unless the Company would sell for $7,000,000 in bonds (Record, pp. 122, 123).

By reason of these acts, the alternative obligation of the City to continue and to recognize and effectuate a continuance of the contract evidenced by Ordinance No. 44 for a further term of twenty years has come into effect; but the City refuses to acknowledge such right on behalf of the Water Company, or such obligation on the part of the City. On the contrary, the City claims that the Water Company is "at

the sufferance and will of the city and county of Denver, and not otherwise, engaged in business within its confines, and in supplying water to it and its inhabitants" (p. 123). Wholly disregarding its obligations and agreements in that particular, "and with the object and intent, as your defendant believes and so charges, of depreciating and destroying the value of your defendant's property, so that the same may be obtained by said City at much less than the appraised or the actual value thereof, and of forcing your defendant to part with its said property at a great and ruinous sacrifice" (p. 124), the City has not only failed and refused to complete said purchase and pay for said property, but has also failed and refused, and still fails and refuses, to renew or to recognize the right to a renewal of said contract; but, "on the contrary, it has entered upon, and ever since has persisted in, and is now pursuing a wholly unconscionable and inequitable course of conduct, intended to destroy and depreciate the value of said property, and to deprive your defendant of said property without due process of law," and to so harass, damage and impede the Water Company as to eventually force a sale of the property and a release of the contract obligations at much less than the appraised or actual value thereof, and so ruinously inadequate and insufficient as not to pay the outstanding bonds, or, by the construction of an independent competing plant, to utterly destroy the value of the property as a water works system (p. 124).

In pursuance of said plan and purpose, the City, the inhabitants thereof, the users and consumers of water therein, and certain political agitators and

newspapers, have been and are claiming and pretending that every right, contract and privilege heretofore owned, enjoyed or exercised by the Water Company, and resting upon any ordinance, franchise, contract or agreement, "ceased, terminated and came to an end on the 10th of April, A. D. 1910" (p. 124). The City and each of the others mentioned above are further claiming and pretending that the Water Company is doing business within the City and furnishing water and "occupying the streets, alleys, avenues and other public places of said City solely at the will of said municipality and the inhabitants thereof" (p. 124). The City and each of the others above mentioned are further claiming, pretending and asserting that there is no existing contract with or obligation upon the City either to purchase the waterworks plant at the appraised value, or any other price, or at all, or to renew the contract evidenced by Ordinance No. 44, or any other contract, agreement or obligation of any nature whatsoever;

> "all of which claims and pretences are without foundation in law or in equity, are unconscionable and extremely prejudicial, and are made and devised and reiterated and insisted upon with the sole purpose and intent of depreciating the value of said property; and the same have already depreciated said value, and if persisted in, will further greatly impair and depreciate, if not wholly destroy, the value of your defendant's said property, and the interest of each of its stockholders therein" (pp. 124, 125).

The City, its officers, and the inhabitants and users of water therein, incited thereto by certain agitators and newspapers, have, since April 10, 1910, and still do claim, assert and insist that all rights of the Water Company under Ordinance No. 44, or any other ordinance or contract whatsoever, ceased, terminated and came to an end on said April 10, 1910; and for that reason they have failed and refused, and still do fail and refuse, to comply with the reasonable rules and regulations promulgated by the Water Company with reference to the use of the water furnished and supplied by it, and governing the use of water for irrigation and other like matters (pp. 138, 139). Yet, in spite of this illegal, inequitable and unjust attitude, the City and the inhabitants thereof, and the users of water therein, claim and insist that the Water Company shall continue in the business of supplying water as it has heretofore done, and shall from time to time make enlargements and betterments for the purpose of affording such service as the City and its inhabitants claim to be entitled to, and shall expend large sums of money for that purpose, until such time as the City shall, through the inequitable conduct described above, be enabled to acquire the waterworks at such grossly inadequate price as the City may deem fit to pay, or until the City may have completed and put in operation its own separate, independent, competing municipal plant. The waterworks of cross-complainant constitute practically the sole means and source of supply of water to the City and its inhabitants for any and all purposes, and any failure of such supply would inflict enormous injury upon the City and its inhabitants. For this reason, and also because under the renewal of its contract, evidenced by Ordinance

44, and under the existing contracts with included municipalities, it has the right and is required so to do, the Water Company has continued and is continuing in the business of supplying water (p. 139). But the growth of the City of Denver, and increasing demands for water, which are very heavy, require the constant enlargement and extension of the water system. These enlargements and extensions can only be provided by borrowing additional capital; but the unconscionable and wrongful conduct of the City hereinabove described has and will so impair the credit of the Water Company as to render it impossible to procure the sums of money necessary for such purposes (p. 141).

As a part of the conspiracy, plan and purpose hereinabove mentioned to harass and annoy the Water Company, to avoid the legal obligations of the City under Ordinance 44, to impair the value and injure the usefulness of the Water Company's property, and obtain the same for less than its true value, or else utterly destroy it as hereinabove stated, there was submitted to vote of the qualified electors at the City election held in May, 1910, a so-called amendment to the charter of Denver, aimed specifically at the Water Company, and naming it in terms (Record, pp. 125, 140).

Section 264A is attached to the cross-bill as Exhibit C, and appears at pages 167-170 of the record. It is hereinbefore set forth at pages 120-127. It is alleged that this so-called charter amendment is invalid for many reasons; among others, that it is, if properly adopted, a law impairing the obligation of prior existing contracts, and that it amounts to a deprivation of property without due process of law.

This so-called charter amendment is lengthy, involved and confusing in its terms; it includes a great number of separate and independent matters; it is analyzed in the cross-bill (pp. 125-129). Among other things, it amounted to an offer by the City to the Water Company of $7,000,000 in bonds of the City for the water plant, which had just been appraised at $14,400,000, and a requirement that, unless this offer was accepted by the Water Company, the City should forthwith proceed to erect its own independent municipal water plant for the purpose of supplying the City with water for all uses and purposes. This was done regardless of the real value of the Water Company's plant, and in the face of an appraisement thereof just made, and finding its value to be $14,400,000. It was done without any investigation of the property upon the part of the City, but arbitrarily, in ignorance of the extent and value thereof, and for the purpose of compelling the Water Company to part with its property at less than half its real or appraised value (p. 140). The Water Company has, of course, refused to accept so ridiculous a proposition (p. 140). The Public Utilities Commission, created, elected and endowed with powers by the adoption of said section 264A, has determined against the purchase of said plant at the appraised value, and under the authority derived from said section, and in view of the refusal of the Water Company to sell for $7,000,000 in bonds, was at the time of filing the bill and cross-bill proceeding to submit to a vote of the qualified electors the proposition of issuing $8,000,000 in bonds, for the purpose of erecting an independent, competing municipal plant to supply the City and County of Denver and its inhabitants with water for all uses and purposes, from

which municipal plant, when completed, the City, by said section 264A, was required to take its entire supply of water (p. 142). For this purpose the council had enacted an ordinance, calling said election for the first Tuesday in September, 1910. And it was the purpose of the City and the Public Utilities Commission, in case said bonds were authorized, to immediately negotiate and sell the same to innocent purchasers for value (p. 142). The plans and purposes of the Public Utilities Commission, and the animus with which they were and are inspired, is indicated by their printed report publicly circulated by them and by the City just prior to the commencement of this suit. This appears in the record as Exhibit E (pp. 216-231).

The acts and doings of the City and the other defendants hereinabove described, the things which they have done and propose and threaten to do,

> "were, are and will be wholly illegal, inequitable, unconscionable and contrary to and destructive of the vested contract and property rights of this defendant, and were, are and will be calculated and intended to further complicate the situation, to harass this defendant, to impair and destroy the property of this defendant and the value thereof, and to cast a cloud upon its title, and to impose upon this defendant and its property, as well as upon the property of all other taxpayers within said City and County of Denver, an enormous, unjust, illegal and unnecessary burden of taxation" (p. 143).

All of the foregoing matters appear affirmatively from this record, and are wholly undenied. They must, therefore, be taken to be true in every particular. Certainly, they present a case calling for equitable relief, and accordingly the cross-complainant prays an injunction, both temporary and perpetual, to prevent the further continuance of the illegal and wrongful acts complained of (p. 144); a decree declaring and enforcing its contract and franchise rights, quieting its title thereto, as well as to its street rights, removing therefrom the clouds created by the various matters hereinabove described, and enjoining the defendants to the cross-bill from in any manner interfering with the future enjoyment of said rights (p. 145); a decree that said section 264A is unconstitutional, null and void, and restraining further action thereunder (p. 145); and finally, by a general prayer of the broadest possible scope, such other further and different relief as the court may consider justified by the facts disclosed (p. 145).

If we view the case from the standpoint of the Water Company's contract rights alone, we submit that the cross-complainant is clearly entitled to all of the relief which it specifically prays, and, under its general prayer, such other relief as a court of equity may administer, and which may be necessary to fully protect and enforce the rights which flow from its contract relations with the City.

(*b*) *Impairment of contract obligation in violation of section 10, Article I, of the Constitution of the United States.*

One result of the City's action is beyond question to impair the obligation of the prior existing contracts hereinbefore set forth and discussed. This point is clearly presented by paragraph Fifteenth of the cross-bill (p. 132). Counsel for appellants have not discussed this question with specific reference to the point as made by the cross-bill, but we take it that their discussion of a like question raised by the complainant Trust Company is intended to apply also to the cross-complainant's contention. Counsel for appellants approach this question only from the point of view of an exclusive contract, or one containing a binding stipulation, whereby the City is forbidden to erect its own waterworks. They treat the constitutional inhibition as one directed solely to the impairment of an exclusive contract. They even go farther, and seem to claim that no obligation of any contract is protected, unless it be an obligation to confer an exclusive right. Reduced to a syllogism, their argument is that no contract obligation is protected by the impairment clause, unless it be an obligation conferring an exclusive right; the contract here under discussion confers no exclusive right; therefore, it is not within the protection of the Federal Constitution. It is, of course, unnecessary to say that the foregoing conclusion is wrong, because the major premise is faulty.

The language of the Federal Constitution is that "No State shall pass any law impairing the obligation of contracts." It is too clear for argument that the

protection extends to every obligation of every contract, whatever may be its character. We submit that there is fair ground for the contention that the contract relations between the City and the Water Company were of such a character as to prohibit the City during the continuance of the contract from taking its water supply from any source other than the works of the cross-complainant, which would necessarily involve a prohibition against the erection by the City of competing works, and making such works the exclusive source of the City's water supply.

Section 6 of Ordinance 44 requires The Denver Water Company to "at all times furnish water to the City, and to private consumers," of a ceratin quality.

Section 8 requires the Water Company at all times to "keep and supply the said hydrants with an abundant supply of water."

Section 10 requires the City to pay for the hydrants at a certain rate.

Section 12 gives the City a right to a 10 per cent reduction in hydrant rentals, in case of renewal.

And section 14 requires the Water Company, "at all times during the existence of this contract, or any renewal thereof," to supply the City with water free of charge for certain uses.

The result of these stipulations is that the Water Company has agreed, during the period of twenty years, and also during the period of any renewal of the contract, to furnish water to the City, and the City has agreed, during said period of twenty years, and also during the period of any renewal, to receive and pay for the same at certain fixed rates. But section 264A purports to make the provisions of that

measure a substitute for and exclusive of all other provisions in respect to "supplying the City and County of Denver and its inhabitants with water for all uses and purposes;" and the only means provided for obtaining such supply are either by the purchase of the works of The Denver Union Water Company at $7,000,000 in bonds, or by constructing and putting into operation "a complete system of water works for supplying said City and County and the inhabitants thereof with water for all uses and purposes."

The Water Company has refused to sell its works at what it claims is a grossly inadequate price, and, therefore, the City, under section 264A, must forthwith provide the independent municipal plant, and must thereafter obtain its water supply therefrom. And this it was attempting to do when the injunction of the lower court intervened.

It would seem to be perfectly clear that when a water company holds a contract with a city, which obligates the city for the period of twenty years to obtain its municipal water supply from the works of said company, a subsequent enactment obligating the city to obtain its water supply elsewhere, and for that purpose authorizing it to erect its own waterworks, to be the exclusive source of supply, impairs the obligation of the contract. This is plainly intimated by the Supreme Court in Helena Water Works vs. Helena, 195 U. S., 383, 391, 392.

But it is unnecessary for the cross-complainant to rest upon this contention. It is clear beyond question that the Water Company's contract required the City, at the expiration of the twenty-year period, either to purchase or to renew, and by its failure to

do the one it became obligated to do the other. But by section 12 of Ordinance 44 (p. 151) the obligation to renew carried with it the further obligation to effectuate the renewal and furnish legal evidence thereof, "by ordinance to that effect." This action, of course, was to be taken by the mayor and the City Council, and the contract so required, as counsel for the appellants freely concede. No evidence is needed to inform the court that the right to have a contract of this nature renewed, and the further right to have the renewal evidenced by proper municipal action in due form, are valuable contract and property rights.

The bonds of the Water Company, amounting in the aggregate to $8,000,000, are due in 1914. At that time, beyond question, new financial arrangements must be made. It is necessary for the Water Company to borrow from time to time additional capital with which to provide the necessary extensions and enlargements for its system. None of these things can be done while the right of renewal is in controversy with the City, while the City not only refuses to renew or recognize a renewal, but enacts a measure forbidding it to renew as the contract provides, forbidding it to furnish evidence of such renewal in the form of action by the mayor and the City Council, and forbidding it to exercise any right or power of renewal unless authorized so to do by favorable vote of the qualified electors. The language of section 264A upon this point is as follows:

> "Except as in this section provided, the City and County shall never purchase or acquire, or exercise any option, right, privilege or power of purchasing or acquiring

> any water plant or system from any person, persons or corporation except upon a vote of the qualified electors first had and obtained, authorizing the same; and wherever in any ordinance or contract the former City of Denver was given the right, or the City and County now has the privilege or power to purchase or acquire any water system or plant, or *to extend any contract with reference thereto,* the term 'City,' used in any such ordinance or contract shall be taken and held to mean the qualified electors of the City and County, and not otherwise."

This language was directed specifically to the contract evidenced by Ordinance 44, for that was the only ordinance or contract with the former City of Denver containing any such provision as is there referred to. The foregoing language of section 264A is a manifest attempt by legislative act of the City, through its electors, to amend and change the terms of a prior existing contract in a most important particular and in a manner exceedingly detrimental to the Water Company. Clearly, this impairs the obligation of the prior contract, as has been recognized in numerous decisions.

In Railroad Company vs. Pennsylvania, 15 Wall., 300, it was said:

> "The obligation of a contract depends upon its terms, and the means which the law in existence at the time affords for its enforcement. A law which alters the terms of a contract by imposing new conditions, or

> dispensing with those expressed, is a law which impairs its obligation, for such a law * * * relieves the parties from the moral duty of performing the original stipulations of the contract, and it prevents their legal enforcement."

In Murray vs. Charleston, 96 U. S., 432, at 448, it is said:

> "There is no more important provision in the Federal Constitution than the one which prohibits States from passing laws impairing the obligation of contracts, and it is one of the highest duties of this court to take care the prohibition shall neither be evaded nor frittered away. Complete effect must be given to it in all its spirit. The inviolability of contracts, and the duty of performing them, as made, are foundations of all well-ordered society, and to prevent the removal or disturbance of these foundations was one of the great objects for which the Constitution was framed."

A law which changes the terms of a contract by making new conditions, or changing those in the contract, or dispenses with those expressed, impairs its obligation.

State Tax Cases, 15 Wall., 320.

It is not important that the impairment is but slight, if it exists at all. If there is any impairment,

the provision of the Constitution is violated, and the court will interfere.

Farrington vs. Tennessee, 95 U. S., 683.

Anything which diminishes the efficiency of a contract, or retards its enforcement, amounts to an impairment of it.

Louisiana vs. New Orleans, 102 U. S., 207.

In Green vs. Biddle, 8 Wheat., 84, the court said:

> "The objection to a law, on the ground of its impairing the obligation of a contract, can never depend upon the extent of the change which the law effects in it. Any deviation from its terms, by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, however minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation."

It is not a question of degree or manner or cause, but it is a question of encroachment in any respect on the obligation of the contract, dispensing with any part of its force.

Planters Bank vs. Sharp, 6 How., 327.

In Lamb vs. Powder River Live Stock Co., 132 Fed., 434, the Circuit Court of Appeals, speaking through his honor, Mr. Justice Van Devanter, said (p. 439):

"Not only is a right of action, which springs from contract, property within the protection of the fourteenth amendment to the national Constitution, but any state statute which denies, unreasonably restricts, or oppressively burdens the exercise of a right of action springing from a prior contract, impairs its obligation within the prohibition of the Constitution, Article I, Section 10. The obligation of a contract consists in the binding force of its stipulations upon those who make them, and depends upon the continued existence of a means of enforcing its stipulations; otherwise a contract would be without obligation, and would have only such effect as the parties should choose to give it. Every lawful contract gives rise to a right in one party to require performance of the stipulations of the other, and to a corresponding duty of the other to perform them. A subsequent law of a state which denies or diminishes the right of the one or excuses or discharges the other from the performance of his duty impairs the obligation of the contract, although professing to act only upon the remedy."

See also:

Gamble vs. Rural School District (C. C. A., 8th Cir.), 146 Fed., 113, at 117.

Omaha Water Co. vs. City of Omaha, 147 Fed., 1, at 15.

Citizens Street Ry. Co. vs. City of Memphis, 53 Fed., 715.

Missouri etc. Ry. Co. vs. City, 156 Fed., 624.

Detroit vs. Detroit Citizens Street Ry. Co., 184 U. S., 369.

Although a state undoubtedly has power to alter or destroy its municipal corporations, yet its action in doing so, if its result is to interfere in any degree with the performance by the municipality of prior existing contracts, falls within the inhibition of the Federal Constitution.

Graham vs. Folsom, 200 U. S., 248, 253.

The word "contract," as used in this clause of the Constitution, is to be given a broad meaning. In considering the meaning of the word in connection with this provision, Chief Justice Marshall said, in Fletcher vs. Peck, 6 Cranch., 136: "A contract is a compact between two or more parties."

The prohibition applies to implied as well as to express contracts. It applies to contracts with states and municipalities as well as to contracts between individuals and private corporations.

American Smelting Co. vs. Colorado, 204 U. S., 103.

The word "law," employed in the Constitution, is not limited to an enactment by the legislature. A state constitution, the charter of a municipality, or an ordinance or resolution of a city council, fall within the prohibition.

New Orleans Gas Co. vs. Louisiana Light Co., 115 U. S., 650, 672.

Pacific R. R. Co. vs. McGuire, 20 Wall., 36, 44.

Iron Mountain Co. vs. City of Memphis, 96 Fed., 128.

New Orleans Water Works vs. Louisiana Sugar Co., 125 U. S., 30, 31.

Mercantile Trust Co. vs. Columbus, 203 U. S., 311.

Minneapolis vs. Street Ry. Co., 215 U. S., 417.

The contention of appellants that this charter amendment does not amount to the impairment of the contract, because its effect is only a refusal to perform the contract, is clearly without merit. It is completely answered by Mercantile Trust Co. vs. Columbus, *supra*. The enactment here under consideration amounts not merely to a refusal to perform, but is a positive effort by affirmative enactment to change the terms of the existing contract, to deprive the City of power to fulfill its obligation, and to destroy the means of its enforcement.

Quite a similar situation was presented in Shapleigh vs. San Angelo, 167 U. S., 646, at 657. There a Texas statute, as construed by the Supreme Court of Texas, provided that, in case of reincorporation of a town, an affirmative vote of the taxpaying electors was required before the new incorporation could be held for a debt of the old. The Supreme Court of the United States held this to be an impairment of the obligation of outstanding contracts, saying (p. 657):

> "If this indeed be so—and it is difficult to reconcile such a view with those previously expressed by that court — then it would follow, as we think, that said act so

> construed must be regarded, as respects prior cases, as an act impairing the obligations of existing contracts. If the law, before the passage of the act of 1891, was that, by a voluntary reincorporation and a taking over of the property rights of the old corporation, the existing obligations devolved upon the new corporation, it would plainly not be a legitimate exercise of legislative power, as affecting such prior obligations, *to substitute an obligation contingent upon a vote of the taxpayers.*"

The manifest attempt of section 264A is "to substitute an obligation contingent upon a vote of the taxpayers," for an obligation theretofore by the terms of the contract absolute. It clearly constitutes an impairment of the obligation.

(c) Deprivation of property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

But viewed from the standpoint of contract rights, that portion of section 264A which we are now considering amounts to a deprivation of property without due process of law. The absolute right to have a renewal of the contract, in case of failure to purchase; the absolute right to have evidence of that renewal in the form of due corporate action by the City Council and the mayor, are valuable property rights, arising from contract, and of which the Water Company is deprived without due or any proc-

ess of law, when by a subsequent enactment an attempt is made to substitute for the absolute obligation of the City one contingent upon the favorable vote of the taxpaying electors, to substitute for the City as a party to the contract the taxpaying electors thereof, and to take away entirely the right to have any evidence whatever of the renewal.

It is held that contract rights are property rights, within the protection of the Fourteenth Amendment.

Bradley vs. Lightcap, 195 U. S., 1, 19.

St. Louis etc. Co. vs. Cross, 171 Fed., 480.

Lamb vs. Powder River Co., 132 Fed., 434, 439.

Of course, legislative action is not necessary to bring into operation the provisions of the Fourteenth Amendment.

> "The provisions of the Fourteenth Amendment are not confined to the action of the State through its legislature, or through the executive or judicial authority. Those provisions relate to and cover all the instrumentalities by which the State acts, and so it has been held that, whoever by virtue of public position under a state government, deprives another of any right protected by that amendment against deprivation by the state, violates the constitutional inhibition; and as he acts in the name of the state and for the state, and is clothed with the state's powers, his act is that of the

state. Chicago, Burlington & Quincy R. R. vs. Chicago, 166 U. S., 226."

Raymond vs. Chicago Traction Co., 207 U. S., 20, 36.

(*d*) *Quieting title, removal of cloud and prevention of injury to contract and property rights.*

The points discussed in preceding subdivisions (b) and (c) present questions of federal cognizance. They are necessarily involved, because if the Water Company has the contract rights for which it contends, it is entitled to protect the same against unlawful attack; and when that attack is made under the guise of an enactment which impairs the obligation of the contract and amounts to a deprivation of property without due process of law, the enactment must, for these reasons, fall. But all of the acts of the City heretofore done or threatened, and looking to the construction of an independent municipal water plant, derive their authority from section 264A. If that section be invalid, then any municipal bonds issued by virtue of its authority are likewise invalid; and so the injunction of the court below, prohibiting the sale or negotiation of such bonds, was proper.

We do not argue, as appellants' counsel profess to believe, that the obligation of the Water Company's contract would be impaired if the City, under proper authority and in a proper manner, engaged in the construction of its own waterworks. Our contention is that the obligation of the Water Company's contract is impaired, and that it is deprived of

its property rights in said contract by virtue of the terms of said section 264A; therefore said section is invalid; but, as said section constitutes the sole authority for the steps now being taken by the City, looking to the construction of its own plant, and as what the City has done and is threatening to do will inflict irreparable injury upon the Water Company, the threatened acts should be prevented by injunction.

Under the circumstances which we have hereinbefore recited, perhaps at tedious length, we submit that the cross-complainant may with propriety insist upon, and ought in justice and equity to receive, the various forms of relief which are within the scope of its cross-bill. That cross-bill seeks the quieting of its title both as to its street rights, its contract rights and its other property, the removal of cloud therefrom, created by the inequitable and wrongful conduct of the City and its representatives, the prevention of further wrongful injury to its property rights, and the enforcement, and protection against unlawful attack, of its contract rights.

The cross-bill is similar in character to the ancillary bill filed by the receivers and considered by the Supreme Court in Blair vs. City of Chicago, 201 U. S., 400, wherein the court ruled (p. 401):

> "Where, as in this case, the attitude and claims of the municipality cast a cloud upon the title to property consisting largely of franchises in the hands of receivers and to be administered under orders of the Court, the receivers may, with the authority of the Court, proceed by ancillary bill to protect the jurisdiction and right to administer the

property, and to determine the validity of claims of parties which cast a cloud upon such franchises and in such a case it is proper to grant an injunction until the rights of the parties can be determined."
See also:

Detroit vs. Detroit Ry. Co., 184 U. S., 368, 378.

Cleveland vs. City Ry. Co., 194 U. S., 517, 531.

Waterworks Co. vs. Vicksburg, 185 U. S., 65, 82.

II.

BECAUSE OF THE INVALIDITY OF SECTION 264A, THE WATER COMPANY IS ENTITLED TO RELIEF UPON ITS CROSS-BILL EVEN THOUGH IT BE HELD: (a) THAT IT NOW HAS NO CONTRACT WITH THE CITY RESPECTING A WATER SUPPLY FOR MUNICIPAL PURPOSES; OR (b) THAT IT NOW HAS NO CONTRACT RELATIVE TO THE MAXIMUM CHARGES TO BE MADE TO PRIVATE CONSUMERS; OR (c) THAT ITS TENURE OF THE STREET RIGHTS IS NOT OF DEFINITE DURATION, BUT SUBJECT TO REVOCATION, THOUGH NOT YET REVOKED; OR (d) EVEN THOUGH IT BE HELD THAT ALL OF THESE CONDITIONS EXIST.

1. The Water Company's Right to Such Relief.

The points which we are now about to present are available to the Water Company from the point of view of the existence of contract rights of the nature set forth in the preceding pages of this argument, and add force to its contentions in that particular; but they would be equally available if such contractual considerations as are based upon Ordinance 44 were removed from the case, and would entitle the Water Company to the protection of a court of equity, even though the court should ultimately negative its contention as to the contract. For it cannot be denied that the Water Company has the right, as a corporate entity, to carry on its business within the City of Denver, to furnish water to said

City for its municipal purposes and to others for domestic, personal and business uses, and to take tolls therefor. Even though it lacked the contract with the City relative to the municipal supply, this would mean only that the price to be paid for the water so furnished was subject to further agreement from time to time. Even though it lacked a contract relative to the maximum charges to be made to private consumers, this would mean simply that the price to be charged to each of such private consumers was a matter of private agreement in each particular instance.

It cannot be denied that the Water Company has the requisite street easement; nor, we submit, can it be successfully denied that such street easement is irrevocable. But even if it were revocable, it has not been revoked, and may not be until the power to revoke is exercised in a proper manner. So long as it is unrevoked, it is a valuable property right and entitled to protection, not only against attempted unlawful revocation, but against any other unlawful act which is likely to inflict irreparable damage.

The Water Company is the owner and in possession of a large amount of property, recently appraised at $14,400,000, the present value of which is alleged to be greater than the appraised value. All of this property is devoted to furnishing a water supply to the City and its inhabitants. The business in which the Water Company is engaged, and to which said property is devoted, is a lawful—nay, a commendable and necessary—business. The Water Company's plant is practically the sole means and source of supply for the entire City and all of its inhabitants. If the Water Company should withdraw for a single day from the business in which it is engaged,

great suffering would ensue. If it should withdraw for a longer period, pestilence and destruction would follow. The City and its inhabitants are insisting that it shall not so withdraw. The Water Company, impelled not only by its contract rights and obligations, but also by considerations of humanity and the law of necessity, continues to devote its money, its property and its efforts to supplying the City and its inhabitants with water. But the City, while insisting upon such continuance, at the same time engages in unconscionable, inequitable and illegal acts, whose necessary result will be the ultimate destruction of the Company's property for any useful purpose, and the utter loss to the Company, its stockholders and bondholders of the immense sums invested therein. It may be, and doubtless is, true that the Water Company could not complain legally of a loss or injury resuting from the doing by the City or by anyone else of a lawful act in a lawful manner; but when an irreparable injury is about to be inflicted by an act or a series of acts which, for any reason, are unlawful, then an actionable wrong is threatened, which equity will prevent by injunction. There can be no doubt of the immense injury which the Water Company will suffer if the City, instead of purchasing the present plant at a fair valuation, or, in lieu thereof, renewing the contract for service, shall erect an independent competing municipal plant, operated at the expense of the taxpayers, and from which the City shall be required to take its municipal supply. But the sole authority under which the City may construct such municipal plant is found in section 264A of the charter, claimed to have been adopted at the city election

held in May, 1910. The sole authority under which the municipal bonds necessary to supply the funds for the construction of such municipal plant may be issued is that same section 264A; and the sole authority for the issuance of the bonds which the City, through its Public Utilities Commission, proposes to issue for that purpose, and which it would have issued and negotiated long since except for the temporary injunction granted by the lower court, is still that same section 264A. It follows that if section 264A is for any reason invalid, everything authorized thereby, and which the City proposes to do under such authority, is unauthorized, illegal, wrongful in the eye of the law and preventable by injunction.

It is well settled that one who, by authority of law, has constructed and is maintaining a plant to be used for the benefit of the public has such a property right as will entitle him, because of its invasion, to restrain any person or corporation from attempting to exercise such right in competition with him without legislative or municipal authority, although his right is not exclusive, in the sense that the lawful grant of a franchise, to be exercised and enjoyed at the same place, was forbidden, and although his right be not of definite duration, or be subject to revocation.

Raritan & D. B. R. Co. vs. Delaware & R. Canal Co., 18 N. J. Eq., 546.

Pennsylvania R. Co. vs. National R. Co., 23 N. J. Eq., 441.

Jersey City Gas Co. vs. Dwight, 29 N. J. Eq., 242.

Central R. Co. vs. Pa. R. Co., 31 N. J. Eq., 475.

Millville Gaslight Co. vs. Vineland Light & Power Co., 72 N. J. Eq., 305; 65 Atl., 504.

Smith vs. Harkins, 38 N. C. (3 Ired. Eq.), 613.

Patterson vs. Wollmann, 5 N. D., 608; 67 N. W., 1040.

Douglass's Appeal, 118 Pa., 65; 12 Atl., 834.

Tugwell vs. Eagle Pass Ferry Co., 74 Tex., 480; 9 S. W., 120.

Green vs. Ivey, 45 Fla., 338; 33 So., 711.

Hudspeth vs. Hall, 111 Ga., 510; 36 S. E., 770.

McInnis vs. Pace, 78 Miss., 550; 29 So., 385.

Carroll vs. Campbell, 108 Mo., 550; 17 S. W., 884.

Cauble vs. Craig, 94 Mo. App., 675; 69 S. W., 49.

Bartlesville Electric L. & P. Co. vs. Bartlesville Interurban R. Co., 26 Okla., 453; 109 Pac., 228.

In Raritan and Delaware Bay R. Co. vs. Delaware and Raritan Canal, *supra*, the Supreme Court of Errors and Appeals of New Jersey, speaking through the chief justice, said (p. 570):

> "The controversy in this case, therefore, is between the complainants and mere wrong-

doers, and the question then arises, has a railroad company any redress against a competition unwarranted by law, and which materially affects the value of the privileges with which it is legally vested? I am at a loss to perceive upon what premise, or by what course of reasoning, other than an affirmative answer to this question can be justified. A franchise to build a railroad for public use, and to take tolls, is property, the title to which is held for the sovereign; and, like every other thing susceptible of private ownership, it must, of necessity, be under the protection of the laws. Unless it can be shown that this species of right is altogether anomalous in its character, and is under the control of exceptional rules, a wrongful invasion of such right cannot but be followed by a legal vindication. Theoretically, then, the claim to judicial redress is clear, and all legal analogies, as well as decided cases, concur in support of the same view."

The foregoing cases related to injury inflicted upon the business of the complainant by the fact that private individuals or corporations were engaging in a rival business of like character in the same locality, without requisite authority from the state or the municipality. But when the municipality itself threatens to invade the field and establish a competing plant, the damage to be reasonably anticipated is so severe as to amount to an entire destruction of the

complainant's business. The fact is so evident that this court has taken judicial notice thereof.

Walla Walla vs. Walla Walla Water Co., 172 U. S., 1, 11, 18.

Skaneateles Water Co. vs. Skaneateles, 184 U. S., 354, 367.

Vicksburg vs. Vicksburg Waterworks Co., 202 U. S., 453, 470.

As was said in the Vicksburg case:

"It needs no argument to demonstrate, as was pointed out in the Walla Walla case, that the competition of the city may be far more destructive than that of a private company. The city may conduct the business without regard to the profit to be gained, as it may resort to public taxation to make up for losses. A private company would be compelled to meet the grantee upon different terms and would not likely conduct the business unless it could be made profitable."

And in the Walla Walla case:

"We think, however, that it sufficiently appears that if the city were allowed to erect and maintain competing waterworks, the value of those of the plaintiff company would be materially impaired, if not practically destroyed. The city might fix such prices as it chose for its water, and might even furnish it free of charge to its citizens, and raise the funds for maintaining the works by a general tax. It would be under no obligation to conduct them for a profit, and the citizens would

naturally take the water where they could procure it cheapest. The plaintiff, upon the other hand, must carry on its business at a profit, or the investment becomes a total loss. * * *

In one of the sudden changes of public opinion to which all municipalities are more or less subject, the city might resolve to enter the field itself—a field in which it undoubtedly would have become the master—and practically extinguish the rights it had already granted to the company."

Not only would such municipal competition destroy the property of the Water Company, and practically exclude it from the business, but, by the express terms of section 264A, if it be valid, the Company is actually excluded from such business and the City is forbidden to deal further with it in respect to a water supply.

By the opening words of that section, all existing powers of the City relative to securing a supply of water for itself or its inhabitants are revoked, and it is provided that hereafter such supply shall be obtained and furnished only in the manner specified in said section. This extinguishes the power of the City, theretofore existing, to deal with The Denver Union Water Company, or any other water company, for a supply of water, either for the City itself or for its inhabitants. The section then proceeds to require the City to establish a municipal plant, either by the purchase of the existing plant of the Water Company or by the construction of an entirely new plant; but, in

either event, the plant so provided is to supply "the city and county and its inhabitants with water for all uses and purposes." (Printed Record, p. 168, fol. 322; p. 169, fol. 324.)

We submit that, if these restrictions are unlawful; if the acts which the City is doing and threatening to do are for any reason wrongful, then the right to relief is manifest.

In City of Mobile vs. Bienville Water Supply Co., 130 Ala., 379; 30 So., 445, a city which was, lawfully and pursuant to due authority, competing with a private corporation in the business of supplying water, was, at the instance of the corporation, enjoined from conducting that competition in an unfair and illegal manner, to the injury of the corporation's business.

The right to engage in a lawful business or occupation, without molestation or interference, is a property right, and is guaranteed and protected by the Fourteenth Amendment. In protection of this right, courts frequently issue the writ of injunction, to prevent wrongful or unlawful interference with or damage to the business, although no tangible property has been or is threatened to be taken or interfered with.

National Telegraph News Co. vs. Western Union Tel. Co., 119 Fed., 294.

McDermott Commission Co. vs. Chicago Board of Trade, 146 Fed., 961.

Board of Trade vs. L. A. Kinsey Co., 130 Fed., 507.

Board of Trade vs. Christie Grain & Stock Co.

L. A. Kinsey Co. vs. Board of Trade, 198 U. S., 236.

What could be a more effectual boycott against the business of The Denver Union Water Company than the attempted procedure of the City as evidenced by section 264A? And if it be unlawful, the case is a proper one for injunction, as the courts have repeatedly held. In all of these cases it is the business right of the complainant which is protected, and not its tangible property.

American Federation of Labor vs. Buck's Stove & Range Co., 33 App. D. C., 83; 32 L. R. A., 749.

Gompers vs. Buck's Stove & Range Co., 221 U. S., 418.

Hopkins vs. Oxley Stave Co., 83 Fed., 912.

In Hopkins vs. Oxley Stave Co., *supra*, the Circuit Court of Appeals for the Eighth Circuit, speaking through his honor, Judge Thayer, said (p. 919):

> "A person's business is property which is entitled, under the law, to protection from unlawful interference."

In American Federation of Labor vs. Buck's Stove and Range Co., *supra*, it was said by the Court of Appeals for the District of Columbia (32 L. R. A., p. 759):

> "Mr. Justice Harlan, speaking for the court in Powell v. Pennsylvania, 127 U. S. 684, 32 L. ed. 256, 8 Sup. Ct. Rep. 992, 1257, said: 'The main proposition advanced by the defendant is that his enjoyment upon the terms of equality with all others in similar

circumstances of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, is an essential part of his rights of liberty and property, as guaranteed by the 14th Amendment. The court assents to this general proposition as embodying a sound principle of constitutional law.'

Again, in Allgeyer vs. Louisiana, 165 U. S. 589, 41 L. ed. 835, 17 Sup. Ct. Rep. 427, the court quoted with approval the following from the concurring opinion of Mr. Justice Bradley in Butchers' Union S. H. & L. S. L. Co. vs. Crescent City L. S. L. & S. H. Co., 111 U. S. 762, 28 L. ed. 588, 4 Sup. Ct. Rep. 652: 'The right to follow any of the common occupations of life is an inalienable right. It was formulated as such under the phrase "Pursuit of happiness" in the Declaration of Independence. * * * This right is a large ingredient in the civil liberty of the citizen.'

In Hopkins vs. Oxley Stave Co., 28 C. C. A. 99, 49 U. S. App. 709, 83 Fed. 912, the Circuit Court of Appeals for the Eighth Circuit, said: 'The right of an individual to carry on his business as he sees fit, and to use such implements or processes of manufacture as he desires to use, provided he follows a lawful avocation, and conducts it in a lawful manner, is entitled to as much consideration as his other personal rights; and the law should afford protection against the efforts of powerful combinations to rob him

of that right and coerce his will by intimidating his customers and destroying his patronage.'

It will thus be seen that the supreme law of the land guarantees protection to all who desire to engage in a lawful calling or business, subject, of course, to such reasonable regulations as it may be necessary to impose. And when Mr. Gompers advises his followers that a man is entitled to protection against a threatened destruction of his house, but none against a malicious destruction of the business which enables him to maintain his house, Mr. Gompers is mistaken."

And this received the apparent approval of this court (221 U. S., 418).

In Dobbins vs. Los Angeles, 195 U. S., 223, the right which was threatened was the right to carry on a certain business in a certain locality, and this court held that complainant was entitled to an injunction to prevent unlawful interference with such business.

The fixing of rates to be charged pertains to, and is an interference with, and restriction upon, the conduct of the business; but whenever it appears that the authority which has undertaken to fix such rates was without power to do so, or that the power, though possessed, has been improperly or illegally exercised, the courts do not hesitate to issue injunctions at the instance of the one whose business is thereby injured, though no tangible property is interfered with.

Ex parte Young, 209 U. S., 123, 167.

The numerous injunctions against unfair competition are based upon the same principle.

38 Cyc., 760.

And injunctions which have frequently been issued prohibiting the business of ticket brokerage are of like character.

Nashville Co. vs. McConnell, 82 Fed., 65.

Louisville & Nashville vs. Bitterman, 144 Fed., 34.

Bitterman vs. Louisville & Nashville, 207 U. S., 205.

In Nashville Co. vs. McConnell, *supra,* it was said (p. 80):

> "The case simply calls for an application of the injunctive process to prevent complainant's business from fraud and obstruction, and the business is just as much a subject of suit, with a right to protection, as ordinary forms of tangible, real and personal property. Whatever doubt may have been expressed at any time the cases are now agreed upon this proposition. It needs no extended statement to make it manifest that the right to carry on a business without interference, without fraud, and without obstruction, is one of the most valuable of all rights. Indeed, in the commercial world, the right of greatest value is the right to freely carry on a lawful business without unlawful interruption. It is a substantial right, which may be protected by any remedy known to the court as fully as a constitutional or stat-

> utory right, and as fully as a right in the ordinary forms of property."

This case has received the express approval of the Supreme Court (207 U. S., 223).

Even though it should be held that Ordinance 44, Series of 1890, had by its express terms, or for any other reason, terminated, the rule would be no different.

In Farmers Loan & Trust Co. vs. City of Sioux Falls, 131 Fed., 890, a case heard and decided at circuit by their honors, Judges Sanborn and Carland, the trustee in a water company's mortgage had brought a suit against the city, seeking an injunction to prevent the construction of a municipal waterworks plant, on the ground that an existing contract was exclusive of the right of the city to construct and operate competing waterworks of its own. The water company had filed a cross-bill, seeking to enjoin the construction of said waterworks, not upon the theory of an exclusive contract, but because the acts and threatened acts of the city in that regard were unauthorized, and therefore illegal. The contract upon which the original complainant relied had by its express terms expired. The court noticed this fact (p. 898), but held that even if it were in effect it did not, by its terms, exclude the city from erecting its own waterworks. The court then proceeded (p. 901):

> "Our conclusion is that, if the city was lawfully authorized, under the Constitution and the statutes of the state of South Dakota, to construct and maintain its own water

works in the way it threatens, and was proceeding to accomplish this end, then neither the franchise nor privilege granted to Kuhn and his assigns, nor any of the provisions of the City's contract with him, nor the investment made thereunder and its threatened loss furnish any tenable ground to invoke the aid of a court of equity to prohibit the city from constructing and operating its own water works. * * * "

(P. 902): "The question remains, has the city the lawful right, under the Constitution and the law, to construct and operate its own plant, and thereby inflict upon the complainant and upon the water company the irreparable injury which must follow its maintenance, and to tax their property to pay part of the expenses of committing this injury? If its proposed action is in compliance with the Constitution and the law, it is justifiable, and the complainant and the water company are without remedy for the grave loss they must sustain. On the other hand, if its threatened action is in violation of the Constitution of the state, or if it is without lawful authority under the statutes, then its action is wrongful, unjustifiable, and, as the injury which will be inflicted upon the complainant and the water company must be irreparable, this wrongful action furnishes an unanswerable reason for

the granting by the court of equity of the relief which they seek.

* * * * * * * *

It now appears that the water company has invested in its waterworks system at Sioux Falls an amount in excess of $481,000 [in the case at bar an amount in excess of $14,400,000]; that the property created as a result of this investment has been lawfully acquired and is legally held; that the complainant has an interest in the property and the revenues derivable from the operation of the same to the extent of the indebtedness which the trust deed secures. The Water Company is the owner of the legal title. This property, being so situated, is entitled beyond question to the protection of the law of the land. No person or corporation may invade such rights of property as are held by the complainant and the Water Company, except in pursuance of law. As the establishment and operation of a system of waterworks by the City will practically ruin the security of the complainant and the property of the Water Company, the serious question in this case is whether the City has proceeded in accordance with the law. If not, the injunction must be issued, because the compainant and the Water Company have no adequate remedy at law."

The Circuit Court thereupon determined that the city was not proceeding in accordance with law;

therefore its acts were illegal and wrongful, and decreed accordingly. We are, of course, mindful of the fact that this decree was reversed by the Circuit Court of Appeals (City of Sioux Falls vs. Farmers Loan & Trust Co., 136 Fed., 721); but that reversal occurred for the reason, as the Circuit Court of Appeals determined, that the acts of the city were authorized by law, and therefore not wrongful in a legal sense. It was not decided nor intimated that if this had been otherwise, the decree of the court below would have been erroneous. On the contrary, the plain intimation is that if the Circuit Court of Appeals had found the city's acts to be unauthorized, the decree would have been affirmed.

In National Water Works Co. vs. Kansas City, 62 Fed., 853; 65 Fed., 691, the Circuit Court of Appeals and the Circuit Court, each speaking through Mr. Justice Brewer, protected by decree in equity the property and the business of the water works company, although the contract with the city, which was limited to twenty years, had expired, and although the controlling statute provided that no such contract "shall confer the right to operate the Water Works for any period beyond twenty years from the date of approval of the ordinance as aforesaid;" but the water works company, with the approval and under the protection of this court and of the Circuit Court, continued to operate the waterworks under the provisions of said contract, long after the expiration of said twenty years, and until its property was purchased by the city.

In Los Angeles City Water Co. vs. City of Los Angeles, 103 Fed., 711, the decision is reported which

terminated the long litigation between the city of Los Angeles and the water company. In that case the contract, which was in the nature of a lease, was for a definite period of time, and required the water-works company to surrender the plant to the city at the expiration of the period. It provided, however, that the city should then reimburse the water company for its expenditures made in enlarging and improving the plant. The water works company refused to surrender the plant to the city until it had received the value of such improvements, continued to hold and operate the same, and claimed the right to collect water rates as fixed by the contract, which under its terms had expired. The city, by ordinance, endeavored to fix new rates, less than those mentioned in the prior contract. The water company brought suit to enjoin the enforcement of such ordinance, upon the theory that it impaired the obligation of the contract. The court held:

> "A federal court has jurisdiction of a suit by a water company to enjoin the enforcement of a municipal ordinance fixing rates of charge for water, on the ground that it impairs the obligation of a contract between the City and the Company, although the contract, as set out in the bill, expired by its terms prior to the passage of the ordinance, where it is alleged to be still in force."

And further, because at the expiration of the term the city did not pay or tender the value of the improvements, but continued to require the company

to make extensions and to furnish water free for public uses, the same as before:

> "*Held*, that so long as the company complied with such requirements, and until the city terminated the contract by making or tendering the required payment, its provisions for the benefit of the company remained in force, and the city could not, without unconstitutionally impairing its obligation, reduce the rates which the company was thereby authorized to charge for water supplied to private consumers."

The opinion is lengthy and contains much that is directly applicable to this controversy, but the necessary limitations of this argument prevent too copious quotation. In the course of the opinion the court says (p. 733):

> "The case as now presented shows that, notwithstanding the expiration of the 30-year period mentioned in the contract, the city has not paid or tendered to the complainant company the value of the improvements made in, about, and upon the water works in pursuance of the contract, nor have the respective parties been able to agree upon the value of such improvements. And the bill shows that, although three arbitrators have been appointed, as provided by the contract, for the purpose of ascertaining that value, they have been unable to agree upon the proper amount. Nevertheless, the city insists that the complainant is still bound by

all the obligations imposed on it by the contract, and the complainant so admits. The city still insists upon the complainant extending its lines of pipe as the needs of the city and its inhabitants require, and the keeping in repair those already in existence; upon its erection of additional fire hydrants; upon the furnishing of the city by the complainant with water for the various municipal uses free of charge, and the furnishing of its inhabitants with water for domestic purposes, as provided in the contract; and the company admits its obligation to do so thereunder, and has continued to perform those obligations ever since the expiration of the 30-year period. Yet the astonishing claim is now and here made on the part of the city that all of its grants and covenants made in consideration of the performance of those obligations by the complainant and its predecessors ceased with the 22d day of July, 1898, with the exception of its agreement to pay the value of the improvements made to the property, notwithstanding the fact that it has not paid or tendered to the complainant the value of those improvements. It ought not to be necessary to cite decisions to show that this contention is wholly without merit. It is a self-evident proposition that it takes at least two parties to make a contract, and it is equally plain that, as long as it exists at all, all parties are bound by its provisions. The fact that one of them is a municipal corporation in no manner alters

the case. * * * As has been said, it was settled by the Supreme Court of the state in the suit between the complainant and the city that the company is not bound to surrender the property in question until it is paid for the improvements, but is entitled, until payment is made or tendered, to remain in the exclusive possession thereof, notwithstanding the expiration of the 30-year period. This, of course, can only be because the contract secures it in that right. (In the case at bar section 20 of Ordinance 44 expressly secures such right; Record, page 153)."

* * * * * *

(P. 736): "The complainant here being entitled to the exclusive possession and control of the property, as was explicitly adjudged in the former case between it and the City, and that by virtue of the contract in question, what is it to do with it, except to operate the works? And if it operates them, as the City itself insists that it is bound to do, under what possible terms and conditions does it do so, except those specified in the contract? The City insists that the complainant shall continue to keep the works in repair, and it does so. It insists that the complainant must continue to extend its lines and pipes as required by the contract, and the complainant does so. It insists that the complainant shall continue to ercet fire hydrants, as demanded by the City, and the complainant accedes to the demand. It in-

sists that the complainant shall continue to furnish the City with water for all of its municipal purposes free of charge, and this the complainant continues to do. It insists that the complainant shall furnish the inhabitants of the City with water for domestic purposes, and this the complainant continues to do. To sustain the contention on the part of the City that only the burdens imposed upon the complainant by the contract continue, and that all rights and benefits secured by it thereby ended with the expiration of the 30 years, except the payment by the City of whatever may be ultimately ascertained to be the value of the improvements made to the property by the complainant and its predecessors, would not only violate the first principles of law and equity, but would leave the City at liberty at any time after July 22, 1898, to grant water to another company, with the right to establish a competing system of waterworks for the supply of the City and its inhabitants with water for domestic and other purposes, which other company would be under the protection of the provisions of the Constitution of the State of California, requiring the rates to be fixed for all purposes, including the municipal uses, while the complainant would remain bound to furnish water to the City for those uses free of charge."

* * * * * *

(P. 738): "The defendant City has it in its power to put an end to all of the rights

> and obligations arising under the contract by paying or tendering to the complainant company the value of the improvements made in, about, and upon the water works as therein provided for. It can do this at any moment that it is ready to make the payment, after the amount has been agreed upon or has been otherwise determined. Until it does so, or offers to do so, all of the covenants and provisions of the contract continue, including that prohibiting the City from establishing lower rates than those charged at the time of the execution of the contract."

In Stein vs. Bienville Water Supply Co., 34 Fed., 145, the court was considering a contract whereby it was provided that the water company should have the exclusive right for twenty years of supplying the city with water drawn from a certain source, and, until the city should redeem the plant, should have quiet possession of it, without let or hindrance from the city or from anyone claiming under it. Under this contract it was held (p. 153) that after the expiration of the twenty-year period the exclusive use of the waterworks, and the exclusive right to supply water therefrom to the citizens of Mobile, remained to the water company; and this determination was affirmed by the Supreme Court.

Stein vs. Bienville Water Supply Co., 141 U. S., 67.

In City of Leavenworth vs. Leavenworth City Water Co., 69 Kan., 82; 76 Pac., 451, although the governing statute forbade the granting of a franchise

for a longer period than twenty years, or its renewal, except by consent of a majority of the qualified voters of the city, and although the franchise or contract was expressly, by its terms, limited to twenty years, it was held:

> "The owner of a system of water works, erected and maintained under a valid city ordinance granting a franchise therefor for 20 years, may enjoin the City from taking the plant in an unlawful manner, notwithstanding the expiration of such period."

See also:

> Cedar Rapids Water Co. vs. City of Cedar Rapids, 117 Ia., 250; 91 N. W., 1081, 1090.
>
> Stein vs. McGrath, 128 Ala., 175; 30 So., 792.

In the Skaneateles case (184 U. S., 354) it appeared that the contract between the company and the village had terminated, but the right of the company to continue in business, and to protect that business from unlawful competition, was not questioned. It was there determined, however, that in the particular instance the municipal competition was not unlawful.

But petitioners contend (pp. 195-200 of their Brief) that the Water Company may not question the validity of section 264A except in its capacity as a taxpayer in the City of Denver. We submit that this position is untenable, in view of the doctrine announced in the numerous decisions hereinbefore cited.

It is further contended (p. 201 of Petitioners'

Brief) that the cross-bill cannot be sustained as a taxpayer's bill. This contention will be treated in a subsequent portion of this argument.

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2. *Section 264A Was Never Adopted and Is Not in Effect, Because the Method of Its Submission and Adoption Was in Violation of the Provisions of the State Constitution, the Charter of the City and the General Law. Several Independent, Unrelated and Non-Germane Subjects Were Contained Therein; Yet It was, by Initiative Petition, Submitted and Voted Upon as an Entirety.*

Section 264A has been set out at length in this brief (pp. 120-127), and the objections to it indicated by the above heading, together with an analysis thereof, are set forth in paragraph Eleventh of the cross-bill (Transcript, pp. 125-130). The diversified nature of the matter contained in this section may be indicated by the following classification, which is amply justified by the legal distinctions:

(1) Matter relating to the charter or fundamental law of the City.

(2) Matter relating to the exercise, in a particular instance, of the political right to elect certain persons to certain offices.

(3) Matter relating to ordinary municipal law, not fundamental or constitutional in its character, and therefore not proper charter matter.

(4) Matter relating to a business arrangement with The Denver Union Water Company, involving the making by the City of a binding contract with

the Water Company to purchase its plant at seven million dollars in bonds.

Examples of each of the above classifications may be stated as follows:

The provisions creating the Public Utilities Commission, and outlining, in a general way, its powers and duties, relate to the charter or fundamental law of the City and fall under classification (1) above.

The provisions relating to the election of Anderson, Van Cise and Fellows, as members of the Public Utilities Commission, affect a political right and fall within classification (2) above.

The provisions for creating a municipal indebtedness of eight million dollars, and providing that the proceeds shall be devoted to constructing a new waterworks, are not proper charter matter, but relate to ordinary municipal affairs and are an example under classification (3) above.

The provisions by which the City, in its proprietary capacity, attempts to make "a binding contract of purchase" covering the plant of the Water Company do not constitute law at all, either fundamental or charter, and are nothing more than a business arrangement for the creation of a contract, differing in no particular from a contract between the City and a corporation or individual for the paving of a street or the construction of a sewer, and are an example under classification (4) above.

The City itself in its brief (at pp. 137-139) has divided and classified this section 264A into nine separate portions, showing how naturally the subdivision falls, and how it recommends itself to counsel skilled to catch the legal distinctions which separate the

parts. Quotation of this portion of the brief of the City is unnecessary, but we hope that, in confirmation of our segregation, the court will compare that of the City.

With this general statement concerning the structure and contents of section 264A, we wish to call the court's attention to the constitutional and charter provisions which governed the submission of this section to a popular vote.

Section 5 of Article XX of the State Constitution is set forth in full at pages 241-243 of the brief filed by counsel for the City, and by it exclusive power is given to the citizens of Denver "to amend their charter, or to adopt a new charter, or to adopt any measure as herein provided." Permission is given to petition the City Council "for any measure or charter amendment or a charter convention."

Such language clearly recognizes and preserves the distinction between a measure, a charter amendment and a new or supplementary charter. The disjunctive "or" is used and not the connective "and." The Constitution provides that upon the filing of such petition for either of said matters, "the Council shall *submit the same* to a vote of the qualified electors." And again, "the Council *shall submit* it at a special election." By which is clearly meant that if a measure is petitioned for, that shall be submitted; or if a charter amendment is petitioned for, that shall be submitted; or if a charter convention is petitioned for, that shall be submitted. But the submission of a measure and a charter amendment at one and the same time, and as part of one and the same question, is clearly prohibited. The Constitution further

provides: "In submitting any such charter, charter amendment or measure, any alternative article or proposition may be presented for the choice of the voters, and may be voted on separately, without prejudice to others." But it is not provided that two propositions may be submitted, not in alternative form, but in a single question, so that they must be voted upon together and not separately. On the contrary, this is prohibited. Again, the Constitution requires the city clerk to publish, prior to the election, "the full text of any charter, charter amendment, measure or proposal for a charter convention, or alternative article or proposition which is to be submitted to the voters." It requires the clerk, after said election, to publish "the full text of any charter, charter amendment, measure or proposal for a charter convention, or alternative article or proposition, which shall have been approved by a majority of those voting thereon." It requires the clerk to certify to the secretary of state, with the vote thereon, two copies of every defeated "alternative article or proposition, charter, charter amendment, measure or proposal for a charter convention." In all these cases the disjunctive "or" is used. By a separate provision, the Constitution requires:

> "Each charter shall also provide for a reference, upon proper petition therefor, of measures passed by the Council to a vote of the qualified electors, and for the initiative by the qualified electors of such ordinances as they may by petition request."

From these constitutional provisions it is clear that the makers of the Constitution had in mind the

following distinct and separate matters, to-wit: (1) a measure; (2) a charter amendment; (3) a request for a charter convention; and (4) an ordinance. It is equally clear that each of these was to be kept distinct, apart and separate from the others. The command of the Constitution is that any one of these things may be, and in a proper case must be, submitted to the vote of the people; but the command of the Constitution is equally clear that any one of them must be submitted singly, and not jointly with any of the others. The provisions of the charter in effect at and prior to the election of May, 1910, and therefore controlling, are equally clear.

Section 20 of the charter provides:

> "Any measure, charter amendment, or proposal for a charter convention, may be submitted to a vote of the qualified electors, in the manner provided by the Constitution. Nothing in this section shall apply to the provisions contained in this charter regarding the initiative and referendum concerning ordinances."

Sections 21-23 of the charter relate to the submission of an ordinance upon referendum, or pursuant to initiative petition. In either case the council is required to *refer it—i. e., the ordinance alone*—to a vote of the electors.

Section 179 of the charter of the City and County of Denver is as follows:

> "At any election at which any measure, charter amendment, proposal for a charter

> amendment or ordinance, shall be submitted to a vote of the qualified electors, the official ballot shall, by proper words to be provided by ordinance, show the nature of the measure, charter amendment, proposal for charter convention or ordinance, to be voted upon, and shall give to each voter the right to place a cross mark upon his ballot showing clearly his intention to vote for or against said measure, charter amendment, proposal for a charter convention or ordinance, and in case any separate or alternative propositions be submitted, the ballot shall be prepared so as to enable the voter to express his intention in regard to each proposition."

Here, again, the disjunctive "or" is used. A measure, a charter amendment, a proposal for a charter convention, and an ordinance are distinguished one from the other; and the command is direct that each must be proposed, and each must be voted upon separate from the other.

The charter contains no provisions respecting the conduct of elections at which municipal officers are voted for; but by section 178 of the charter the general law of the state concerning elections is adopted. Section 178 of the charter is as follows:

> "The general law concerning elections, including that in relation to the qualification of electors, registration of voters, the nomination of candidates, calling and conduct of elections, the form of ballots therefor, canvassing of the returns thereof, issuing of

certificates of election and the punishment of election frauds and offenses, shall be in full force and effect in the city and county, except as otherwise provided herein."

One of the state statutes, which thereupon comes into effect, is found in Revised Statutes of 1908, page 650, section 2235, which is as follows:

"Every ballot, intended for the use of voters, shall contain the names of all candidates for offices to be balloted for at that election, whose nominations have been duly made and accepted as herein provided, and who have not died or withdrawn, and shall contain no other names of persons except that, in case of electors for president and vice-president of the United States, the names of the candidates for president and vice-president shall be added to the party or political designation; the name of each person nominated shall be printed upon the ballot in but one place, but there shall be added opposite to the name of each person nominated the party or parties or political designation, expressing in not more than three words for one party, as specified in each of the certificates of nomination nominating him for the office. The names of the candidates for each office shall be arranged under the designation of the office, in alphabetical order, according to surnames, except that the names of the candidates for the offices of electors of president and vice-president of

the United States shall be arranged in groups, as presented in the several certificates of nomination. There shall be left at the end of the list of candidates for each different office as many blank spaces as there are persons to be elected to such office, in which the elector may write the name of any person not printed on the ballot for whom he desires to vote as a candidate for such office. Whenever the approval of a constitutional amendment or other question is submitted to the vote of the people, such questions shall be printed upon the ballot after the lists of candidates. The ballots shall be so printed as to give to each voter a clear opportunity to designate by a cross mark (X) in a sufficient margin at the right of the name of each candidate, his choice of candidates and his answer to the questions submitted, and on the ballot may be printed such words as will aid the voter to do this, as 'Vote for one,' 'Vote for three,' 'If you have not voted a straight ticket above, place a cross mark (X) with ink opposite each name you wish to vote for in the blank space left for that purpose,' and the like. It shall be lawful to designate the political party or nominating committee by which each list of candidates is nominated, by an appropriate emblem or design, such as a flag, eagle, rooster or other device, as may be set forth in the certificate of nomination; Provided, no two sets of nominations shall use or have the same device, and each political party or

nominating committee shall have the prior right to use the device used by it at the last similar election. When any political party or nominating committee in its certificate of nomination certifies any such emblem or device, the name or title of such party or nominating committee (in not more than three words), together with such emblem, or device, opposite thereto, shall be placed in a line at the top of the ballot with a blank square opposite thereto, in which a cross mark may be placed by the voter; all such party designations and emblems so certified shall be placed in parallel lines, one under another, on the top part of the ballot, above the list of candidates. Proper words of instruction shall also be inserted, such as these: 'To vote a straight ticket, place a cross mark (X) with ink in the square opposite your party emblem.' It shall be lawful for a voter to make a cross mark in any such square following any such party name and emblem and such mark shall indicate and be counted as a vote for each and every candidate on the ballot nominated by the party or committee after whose name and emblem the mark is so placed. The extreme top part of each ballot, above the portion which contains the names of the candidates to be voted for, and the party and committee names and emblems, shall be divided by two perforated lines, into two spaces, each of which shall be not less than an inch in width, the top portion being known as the stub,

and the next portion as the duplicate stub; upon each of said stubs nothing shall be printed except the number of the ballot, and the same number shall be printed upon both stubs. Stubs and duplicate stubs of ballots shall both be numbered consecutively by numbers thereon. All ballots shall be uniform and of sufficient length and width to allow for the names of candidates and officers to be printed in clear, plain type, as herein required, with a space of at least one half inch between the different columns on said ballot. On the back of each ballot shall be printed, in capital letters, in two lines, pica gothic, or type not smaller in size, the endorsement, 'Official ballot for.....,' and after the word 'for' shall follow the designation of the election precinct or political division, for which the ballot is prepared, and the date of the election, and a fac simile of the signature of the clerk who has caused the ballot to be printed. The ballot shall contain no caption, or other endorsement, except as in this section provided. Each county, city or town, clerk shall use precisely the same quality and tint of paper and kind of type, and quality and tint of plain black ink for all ballots furnished by him at one election. Whenever candidates are to be voted for only by the voters of a particular district, county, city, town or other political division, the names of such candidates shall not be printed on any other ballot than those provided for use in such

district, county, city, town or political division respectively. The ballots shall be of such form, and the endorsements thereon so printed, that they may be folded in such a way that when so folded the whole endorsement shall be visible, and the contents of the ballot shall not be exposed. There shall be but one ballot box at each polling place for receiving ballots cast for candidates for office."

As to the contract between the City and The Denver Union Water Company, for the purchase of the Water Company's plant at $7,000,000 in bonds, which is incorporated in section 264A, that amounted to an acquisition by purchase of a public utility, and is covered by the requirements of Article IX of the existing charter of Denver, which are fully explained in paragraph Sixteenth of the cross-bill (p. 256). By virtue of the provisions of that article, no public utility, such as a water plant, could be acquired by the City by purchase or otherwise unless certain essential preliminary steps had been taken, and unless, further, "the question of whether or not such bonds shall issue shall be submitted to the taxpaying electors."

Section 264A purports to make a binding contract to purchase, without submitting any such question to the electors. But, passing for the moment that objection, the command of the charter is that the question of issuing the necessary bonds shall be submitted to the electors, which is equivalent to a command that it shall be so submitted, singly and disconnected from other matters.

It follows, from what has been said, that a charter amendment, a proposal for a charter convention, a measure, an ordinance, the election by vote of city officials, and the question of authorizing the acquisition of a public utility, are each separate and distinct matters, and are clearly so treated in the Constitution, the applicable statute, and the governing charter.

It also follows that in respect to each of said matters there is a direct command that it alone shall be submitted to the vote of the electors, disconnected from any other matter of a like or different character, to the end that the will of the voters, as to each one of said several different matters, may be ascertained.

All of these commands were violated in respect to the supposed submission and adoption of section 264A. The entire section, with all the different matters which it contained, was submitted under a single question, upon which a vote in the affirmative meant a vote in favor of everything therein contained, and a vote in the negative meant a vote against everything therein contained.

As to the matters of charter amendment which it presented, creating a Public Utilities Commission, and providing in a general way for its powers and duties, no elector could vote in favor of the same without also voting in favor of Anderson, Van Cise and Fellows, to be members of the commission for the respective terms mentioned in the section, which is a political matter; without also voting in favor of creating an indebtedness of $8,000,000, for the purpose of providing a water supply, which is a matter of occasional and not fundamental law; without also voting in favor of entering into a binding contract

to purchase the property of The Denver Union Water Company for $7,000,000, in bonds, which is a private contract, and not law of any sort; without also voting in favor of issuing $8,000,000 in bonds for the acquisition of a public utility. The voter could exercise no right of choice between the three gentlemen proposed as members of the commission, although the statute required that he should have such right of choice, and should also have the right to himself suggest and vote for any additional candidate. Indeed, no choice was afforded to the voter upon any of the many propositions presented by the question. The elector must vote for or against all of them as an entirety. If he favored one, but opposed others, he must, in order to obtain what he desired, take with it those things which he considered undesirable. If he was opposed to some of the things so presented for his consideration, he must, in order to defeat what he considered harmful and improper, also defeat what might in his judgment be highly advisable and even necessary. His only alternative, to avoid this predicament, was to refrain from voting entirely; and the fact that thousands of electors took this course is indicated by the consideration that the registered vote was 74,647; the total number of votes cast was 61,667; the total cast either for or against section 264A was 23,741; and that it was approved by a bare majority of those voting thereon—that is to say, by a total vote of 12,342. How many of these favorable votes were obtained by reason of the extraneous matter incorporated in the proposal, no one can say. That the proposal contained matter wholly extraneous to a charter amendment has been demonstrated. It was not only extraneous matter, but it was preju-

dicial extraneous matter, because the offer of $7,000,000 in bonds for property of the Water Company, just appraised at $14,400,000, is a direct appeal to the well-known proclivity of human beings who are driving a bargain, to offer a vendor a price less than that demanded by him. It was therefore cunningly calculated to influence voters to approve the entire section in which it was incorporated and with which it was submitted. Such a submission not only violates the direct command of the Constitution, the charter and the governing statute, but it amounts to a fraud upon the electorate, both in law and in fact.

Referring particularly to section 178 of the charter, *supra*, and section 2235 of Revised Statutes, 1908, controlling elections, not only is the election of city officials a matter of a different character and unrelated to the making of a private contract to purchase waterworks, but the nomination and election of each individual candidate is made a separate matter, and the right secured to the elector to vote for or against each individual.

The submission of their names in a group for an elective office was in itself a contravention of the law. The statute says:

> "The name of each person nominated shall be printed upon the ballot in but one place. * * *
>
> The names of the candidates for each office shall be arranged under the designation of the office in alphabetical order according to surnames. * * *
>
> The ballots shall be so printed as to give to each voter a clear opportunity to designate

by a cross mark (X) in a sufficient margin at the right of the name of each candidate his choice of candidates and his answer to the question submitted."

The principle is now well established that propositions submitted to popular vote for adoption must be single, and the submission of a dual or manifold proposition requiring a "yes" or "no" vote is invalid.

City of Denver vs. Hayes, 28 Colo., 110.

Speer et al. vs. People, 122 Pac., 768 (Colo. Sup.).

Brown vs. Carl, 111 Iowa, 608; 82 N. W., 1033.

State vs. Allen, 186 Mo., 673; 85 S. W., 531.

City of Leavenworth vs. Wilson, 69 Kan., 74; 76 Pac., 400.

Gas & Water Co. vs. City of Elyria, 57 Ohio State, 374; 49 N. E., 335.

Truelson vs. Mayor, 61 Minn., 48; 63 N. W., 714.

North vs. Platte Co., 29 Neb., 447; 45 N. W., 692.

Lewis vs. County of Bourbon, 12 Kan., 186.

Marcellus vs. Borough, 71 N. J. Law, 373; 58 Atl., 1099.

Cain vs. Smith, 117 Ga., 902; 44 So., 5.

State vs. Denny, 4 Wash., 135.

McBee vs. Brady, 100 Pac., 97.

Armstrong vs. Berkey, 99 Pac., 921.

Lozier vs. Alexander Drug Co., 99 Pac., 808.

Although the above authorities come from many states and courts, no clearer or stronger exposition of the law can be found than from the Supreme Court in the City of Denver vs. Hayes, where the Colorado Constitution and the charter of the old City of Denver were involved, and the provisions concerning the submission of a single question were far less clear and stringent than at the time section 264A was adopted.

The City Council had passed an ordinance which provided for the submission, at a popular election, of a question of incurring a municipal indebtedness, and to use the proceeds for eleven different purposes. The form of the bill required a vote either for or against the entire question.

As the court said, speaking of an elector:

> "In other words he was not permitted to vote for one or more of a separate purpose and against others, but he must vote for all, against all or not vote at all."

The court then further says:

> "Neither the constitutional limitation nor the statutory provisions expressly declare that only one purpose may be submitted at the same election, nor that, if more than one purpose may thus be submitted, each shall be separately stated. But the object of neither can be attained, and effect to the language in which they are expressed cannot be given, unless such purpose be separately stated, and the amount proposed to be applied to each particular purpose designated. This must be done, not only in the ordinance which provides for the submission, but in the elec-

tion notice; and the ballots must be so prepared that every elector may declare his choice as to each purpose, and the amount proposed to be applied thereto must, also, be stated.

To combine several distinct and independent purposes into one proposition without specifying the amount which is to be devoted to each, is a clear evasion of the law, and, if permitted, would fritter away the safeguards thrown around such transactions. As already indicated, under the provisions of ordinance No. 31, and in the form of the ballot as therein prescribed, an elector has three alternatives; *first*, to vote for all purposes collectively; *second*, to vote against all of them collectively; *third*, to abstain from voting. If he wants to vote for one or more, and against the others, he is not able to do it.

Voting for all combined is not voting for any one or more separately; and so the fact that a majority of the legal votes was cast for the eleven purposes enumerated in ordinance No. 31 and in the notice of election is not equivalent to a majority for any one of the eleven independent purposes. If such a proceeding can be tolerated as was attempted by the city council, then if an aggregate indebtedness of eleven million dollars is authorized by the electors of the city for the eleven purposes enumerated, the city council, after deducting from the sale of

bonds one-eighth of the proceeds and applying the same for park purposes which the charter requires, might devote the remainder to the single purpose of constructing bridges, or improving existing parks, or improving the banks or channels of the Platte river. In fact, that is just what, in principle, was done in this instance when seven-eighths of the proceeds of the bond sale were devoted to the erection of a public auditorium.

By combining the advocates of each of the eleven propositions submitted a majority of the votes was secured, but by the procedure adopted it is impossible to ascertain whether a majority of the electors was in favor of any one of the propositions submitted."

The court then closes the opinion with a quotation from the case of Gray et al. vs. Mount et al., 45 Iowa, 591, as follows:

"'The question to be submitted to the voters was not simply whether it was their will to appropriate the fund; but there must be an *object* for the appropriation in order to constitute the proposition to be voted upon. The object is of the essence of the proposition. This cannot be denied. The appropriation for a given object is the proposition submitted. If there be two objects and a specified amount of funds to be devoted to each, it is very plain that there are two propositions submitted at the same elec-

tion. If they are submitted together it is very clear that the voter cannot vote for one and against the other. He must vote against both, whereby he may defeat one, the success of which he desires, or he must vote for both, whereby he may cause the success of one which he desires to be defeated. If he fails to vote he may thus aid in causing the defeat of his favorite measure, and the adoption of the one he opposes. He has thus no liberty of choice. The plan of submitting the questions, for there are two, resembles more the common device of an auctioneer in disposing of worthless goods, whereby a good article is mingled with them and made to draw bids, or the cunning tricks of gamesters to induce wagers of the unwary, rather than the open, direct and fair manner that always should prevail in elections by the people. The very letter as well as the spirit of our election laws condemns this plan. It has never been heard of that electors were, by any plan, denied the right of choosing one, and rejecting another candidate for office, to be voted for at the same election.' "

City of Denver vs. Hayes, 28 Colo., 110, 115-116, 118.

In the recent case of Speer vs. People, the Colorado Supreme Court had under consideration the provisions of the Constitution and charter of Denver, and while, by an evenly divided court, it was held that the merits of the question would not be deter-

mined until the electors had acted, the prevailing judges said:

> "It may or may not be necessary, when this legislation is completed, for the courts, acting within their own proper sphere, to declare it invalid in a proper proceeding, where the rights of interested parties are affected by it."

An equal number of the court favored an immediate disposition and in such opinion, and a critical analysis is made of constitutional and charter provisions requiring separate submissions, quite in accord with our present contentions and the case of Denver vs. Hayes, was affirmed with renewed vigor.

The Hayes case was followed and applied in the case of Grant vs. The City of Denver, No. 4112 in the Circuit, now District, Court of the United States for the District of Colorado. The City of Denver had attempted to vote a bond issue to construct a municipal plant, and submitted it in a dual form, which permitted the use of the proceeds from the sale of the bonds either to construct or purchase, and the court, applying the decision in the Hayes case, invalidated the action.

In the case of Brown vs. Carl, *supra*, the court says:

> "Another serious defect in the question voted upon is that it fixes the amount of $3,500 as the limit of the amount to be used for maintaining as well as constructing the waterworks. In McMillan vs. County Judge, 3 Iowa, 311, it is said: 'The law contem-

plates unity and directness in the question authorized to be submitted in contradistinction to the uniting of several questions in the same propositon, or the incumbering of any propositon with conditions not required or not permitted by the statute.' The maintenance of the waterworks was a condition not required to be submitted. It was in the nature of an inducement to the voter to cast an affirmative ballot; for it stated, in effect, that the town should not be bonded for more than $3,500, and this sum would be used, not only to pay for construction, but also for maintenance. Stripped of this condition, it is impossible to say whether the majority of electors would have voted in favor of the proposition. It is not a question whether any voter was in fact misled. The validity of an election cannot be made to depend on extrinsic evidence. Is the language of the ballot so plain that there could have been no mistake as to the proposition submitted? We think it should have been, and we are equally clear that it was not. There is no reason for placing anything more on the ballot than the simple question specified in the statute, although something added thereto, if not calculated to mislead, might well be held not to invalidate the election. But here the addition was misleading in its character."

In State vs. Allen, *supra*, it was held that—

"Propositions to the voters of a municipality for the issuance of bonds for the con-

struction of a public building and for improvements in the waterworks and electric-light plant cannot be submitted as one proposition, to be answered 'Yes' or 'No;' and bonds issued pursuant to an election in which they were united in the same submission are invalid."

The court saying (p. 532):

"That this submission contained at least two separate and distinct propositions—one for an increase of municipal indebtedness to a certain amount for one purpose, and another for an increase of municipal indebtedness to another and different amount for another and different purpose—is beyond question. And it being manifest that such a submission was in the teeth of the well-recognized principle of law 'that two propositions cannot be united in the submission so as to have one expression of the voter answer both propositions, as voters thereby might be induced to vote for both propositions, who would not have done so if the questions had been submitted singly' (21 Am. & Eng. Ency. of Law, 2nd Ed., page 47)—a principle recognized by this court in the recent case of State ex rel. vs. Allen, 178 Mo., 555; 77 S. W., 868—the motion to quash the alternative writ was unanimously sustained. * * * This opinion is written simply to make that ruling more explicit."

In City of Leavenworth vs. Wilson, *supra*, it is held that—

> "* * * a ballot submitting to the voters of a city of the first class a proposition to issue bonds 'to purchase, procure, provide, or contract for the construction of waterworks' is dual, and for that reason illegal, and an election carried by the use of such ballot is void."

In the course of the opinion the court says (p. 401):

> "Since, therefore, no bonds may be issued for any purpose or for any set of purposes unless the people be consulted and give their consent, every voter must have a fair opportunity to register an intelligent expression of his will. This the official ballot failed to provide.
>
> The subject of purchasing a particular waterworks plant already in existence is utterly diverse from that of building a new one. It needs neither argument nor illustration to make the plain truth apparent to any mind of ordinary capacity. The judgment of the mayor and council upon one of these subjects might well be approved by the people through a majority vote in favor of bonds, although the judgment of the same officials upon the other subject would be overwhelmingly repudiated at a bond election. The ballot required to be used at the election in question obliged the voter to ap-

prove bonds for both purposes, or to reject bonds for both purposes. If he favored one plan, and disapproved the other, he was allowed no opportunity whatever to indicate his view. Because of the dual ballot, persons adverse to purchase may have voted, with persons adverse to building, for bonds, which, thus supported, carried, although both propositions would have failed ignominiously had they been separately submitted. Therefore the election was not a fair one to the people of the city of Leavenworth."

In Gas and Water Company vs. City of Elyria, *supra*, a portion of the syllabus reads:

"The purchase of waterworks, and the erection of new ones, are distinct measures, requiring different proceedings; and a resolution of council which combines both as one, the question of the issue and sale of the bonds of the municipality for both purposes combined, is unauthorized, and ineffectual for either purpose; nor can it be made effectual for either, by the elimination of the other in the proceedings subsequent to the resolution. It is the policy of the statute that each measure for which it is proposed to issue and sell the bonds of the corporation shall stand on its own merits, unaided by combination with others, and that it be voted upon as an independent measure, by the council and electors, uninfluenced by such combination."

In the course of the opinion the court said:

> "And it is the policy of the statute that the proposition for each separate improvement shall stand on its own merits, unaided by combination with any other measure, and be so acted upon by the counsel in the first instance, and then, if adopted, be so submitted for approval by the electors that each may be voted upon as a separate measure, uninfluenced by combination with others. The reason is that the requisite majority of the council and of the electors may be in favor of one measure, and against the other, or against each; while by uniting them as one, and submitting them to be acted upon in that form, the members of council, and the electors, are required to vote for or against both propositions combined, or abstain from voting at all, and thus denied the right to express their will with respect to each."

In Truelson vs. Mayor of Duluth, *supra*, it is said:

> "If the city council desired to place a proposition to erect a water and light plant or plants fairly and reasonably before the voters, as against a proposition to purchase the existing plant, the proposition should have been submitted so as to allow a free and full expression on the real merits of each."

In North vs. Platte Company, *supra*, it is said:

> "The evil of a proposition in the alternative form is that voters who may be hostile to one of the roads named, and who would vote against aid to such road, may be induced, by reason of the supposed probability of the railroad in which he is in favor being the successful line, to vote in its favor, and thus the proposition in that form may be adopted by the requisite majority, when, had propositions been submitted separately, both would have failed; in other words, electors may be induced to vote for the proposition by exciting false hopes as to the road that will be constructed, and thus carry the proposition by the necessary majority."

In Lewis vs. County of Bourbon, *supra*, it is said, by Mr. Justice Brewer:

> "It may be conceded that two or more questions may be submitted at a single election, provided each question may be voted on separately, so that each may stand or fall upon its own merits. But that is a very different matter from tacking two questions together, to stand or fall upon a single vote. It needs no argument to show the rank injustice of such a mode of submission. By it several interests may be combined, and the real will of the people overslaughed. By this combination an unpopular measure may be tacked onto one that is popular, and carried through on the strength of the latter.

A necessary matter may be made to carry with it some private speculation for the benefit of a few. Things odious and wrong in themselves may receive the popular approval, because linked with propositions whose immediate consummation is deemed essential. It is against the very spirit of popular election."

In Marcellus vs. Borough, *supra*, it appeared that a borough council had resolved that—

"the question of the construction of waterworks be submitted to the voters. The ballots used at such election read 'For' or 'Against' the proposition of construction or purchase of waterworks."

The court says (p. 1100):

"The fifth and sixth reasons filed by the prosecutor challenge the legality of this election upon two grounds: First, that the proposition submitted to the voters thereat was not the one which council had by resolution directed to be submitted; and, second, that the ballots, being in the alternative, viz., for construction or purchase, were indefinite, and the resulting election therefore inconclusive upon the only question designed by the legislature to be referred to the voters.

Each of these points seems to me to be well taken. The proposition required by the resolution of council to be voted was the dis-

creet question of the construction of waterworks by the borough, and not the general policy of the municipal ownership of a waterworks. The form of the ballots made it impossible for the council to obtain any certain response from the voters to the only question it had resolved should be submitted to them, viz., the construction by the borough of a plant. For all that appears, the whole 318 voters may have favored purchase, or, what is more probable, they may have been divided between purchase and construction—perhaps equally so. From no aspect of the case can it be said that the question directed to be submitted was answered in the affirmative by a majority of the voters.

The error under which, as it seems to me, counsel for the defendant labors, is that of deeming the popular election to have been intended by the legislature as a delegation to the voters of the power to pass an enabling act that should vest in the borough council general jurisdiction over the subject-matter, whereas it seems clear that such election is in the nature of a referendum by which the popular will may be made effective upon the specific thing to be done by the borough council in the premises."

In Cain vs. Smith, *supra,* it is said (p. 6):

"The Constitution is clear in its terms in regard to elections on the subject of in-

curring debts. It says that an election shall be held 'for that purpose,' and it is necessarily to be implied that the voters shall be permitted to express their opinion on this question, disconnected from any other proposition which may be submitted for their consideration, not related to the subject of incurring the debt. The purpose and scheme of the Constitution is to discourage the incurring of debts by municipal corporations, and such debts are to be incurred only when the assent of two-thirds of the qualified voters has been freely and voluntarily given. The voters are entitled to have this question submitted to them, so that they may pass upon it freely and untrammeled by any other consideration than the question whether the debt shall be incurred for the purpose for which the money to be raised is to be used. * * * If the General Assembly was allowed to submit two, three or more propositions at one time in connection with the question of incurring debt, and require the citizen to vote for or against all, the question of incurring the debt would no longer be left to the will of the qualified voters of the towns and cities of the state, but would be remitted to the subtlety and ingenuity of those interested and usually influential in passing local legislation, in combining together various matters which might have the effect to bring about a vote in favor of bonds, when it might

not have been brought about if the single issue had been submitted to a vote. * * *"

(P. 7): "When it is apparent that the policy of the Constitution is against the incurring of municipal indebtedness, and that such indebtedness is to be incurred only with the assent of the qualified voters of the municipality, 'at an election for that purpose,' is there not necessarily an implication that the General Assembly shall not submit the question of incurring the indebtedness in such a way that the qualified voters will be tempted, even if not constrained, to authorize the creation of the debt, solely in order that other propositions submitted at the same time may succeed?"

None of the above cases illustrate the inequity of the submission to popular vote in a single question of manifold unrelated and independent propositions, as strongly as the instant case.

A measure was framed which drew to its support those who favored the construction of a municipal plant; those who desired to seize a property appraised at $14,400,000 for $7,000,000; the friends of the individuals who were to serve as commissioners—and the friends of each must be the friends of all; those even who desired a municipal water plant, but who, in fact, did not desire to either impair the obligation of a contract or to work an injustice; and, finally, those who, though not favoring a municipal plant, either by construction or by purchase, favored the creation of a Public Utilities Commission. The descriptive

words themselves were misnomers, as the entire section dealt, not with all public utilities, but only with a water supply.

No elector favoring one but opposing another of the above propositions had an opportunity to express his will. By such a method as this almost any law might be passed by popular election, which had tied to it a sufficient number of devices to attract the support of a majority of the voters. If direct legislation, by petition and reference, is to survive at all, it must be by providing for the clear and distinct submission of a single proposition, in order that the voter may intelligently express his will. Recognizing this fact, the State Constitution and statute, and the charter of the City, have expressly provided for the submission of such single questions, and recognize clearly the distinctions between charters, charter amendments, measures, requests for charter conventions, ordinances, the acquisition of a public utility, and the election of officers.

Aside from the fact that the attempted election of Anderson, Van Cise and Fellows, as commissioners under section 264A, was a very distinct thing from the attempt to purchase the property of the Water Company for $7,000,000, and should be separately submitted to the voters, it is shown, under a separate and succeeding heading, that the provisions of the charter and the statutes of the State of Colorado, governing the election of such officials, were disobeyed in every particular.

The answer to the foregoing argument and authorities is made at pages 203-217 of the City's brief, and consists primarily in the statement that section

264A, as a part of the charter of the City of Denver, is in law itself a constitution, corresponding and entitled to the same construction as a State Constitution.

In Colorado, while legislative acts must be of a single purpose and subject-matter, because the Constitution so requires, it is not necessary that a constitutional amendment be limited to a single subject. The court will notice that in this portion of the answer counsel for the City have carefully refrained from any allusion to those portions of Article XX of the State Constitution and the charter of the City of Denver which expressly provide that propositions and subjects must be singly presented to the electors for their vote, and which we have verbatim copied at the opening of the discussion on this branch of the brief.

The State Constitution and charter are just as explicit in their requirement that a single subject shall be submitted to a vote, as is the State Constitution that a legislative act shall be singly purposed. It is inconceivable how this question can be intelligently argued or determined unless counsel for the City are willing to consider the special and controlling constitutional and charter provisions on this subject.

The case of People vs. Sours, 31 Colo., 369, is of course inapplicable, for the very reason that it concerned the adoption of a constitutional amendment, where it was expressly held that the subject-matter might be manifold.

Almost no consideration whatever is paid to the case of Denver vs. Hayes, 28 Colo., 110, although it is controlling authority, under the circumstances.

Much reliance is placed on the case of City vs. Riplinger, 30 Wash., 281, but the very quotation made from this case to support the contention of the City overwhelms it.

The amendment in that case related solely to a scheme for the control and management of the public library and the payment of the expense incidental thereto. The mere fact that the proposition was grammatically subdivided into sections did not, of course, require a separate vote on each section, and the court expressly held that the questions submitted were a unit, and "that it is the unit of the subject that is demanded by the charter provision requiring each amendment to be submitted separately." Such a condition is not comparable to ours, where an effort and attempt to purchase by private contract a system of waterworks valued at $14,400,000 for $7,000,000 is coupled with a general proposition to construct a municipal plant, and there is tacked on to both of these propositions the election of certain individuals, and other unrelated matter.

In the cases of Nash vs. Council Bluffs, 174 Fed., 183; Farmers Loan and Trust Co. vs. Sioux Falls, 136 Fed., 721, and Swan vs. City of Murray, 146 Ky., 148, it was held that the issuance of the bonds was the single question submitted to the electors, and that the fact that proceeds of these bonds might be used for one or more purposes, *in the discretion and power* of the city council, did not affect the validity of the submission. This was under local laws and statutes differing from those in Colorado.

In these cases the question was in such form as to leave to the discretion of others the spending of

the proceeds of a bond issue, whereas section 264A left no discretion or judgment in the hands of anyone, and it was expressly provided that section 264A itself should constitute the contract of purchase with the Water Company, in case it complied therewith.

In the case of Swan vs. City of Murray it was likewise expressly held that there was no constitutional or other legal provision which required the submission of single subjects.

In State vs. Allen, 183 Mo., 283, it was held that the question of purchasing waterworks and providing for an extension thereto was a single question; which seems perfectly compatible with the decision of State vs. Allen, 186 Mo., 673, where the same court held that the submission of a question involving the incurring of an indebtedness for purchasing and erecting a public building, and repairing and improving a waterworks and electric light plant, was not single but dual, and that such a submission was an invalid one.

The case of Garrigus vs. Commissioner, 39 Ind., 66, should be added to the list of cases previously cited by ourselves, as it holds most clearly that separate propositions must be singly submitted, applying the principle to a case where it was attempted to vote aid to two railroads at the same time.

The citation of Kiernan vs. Portland, 223 U. S., 151, 164, is irrelevant. Objection was made to the issuance of certain bonds to construct a bridge because the consent of the United States had not been obtained, and the court suggested that this was a matter which could not be raised by the plaintiff, but should properly be raised by the United States, and

particularly in view of the fact that the ordinance itself provided that the consent of the United States should be obtained.

This, we believe, covers the cases cited by counsel for the City which seem to have any bearing whatever on this particular question, and we believe it is fair to conclude with the assertion that nothing has been produced which detracts from the binding force of the constitutional and charter provisions, or in any manner modifies the effect of the decision in City of Denver vs. Hayes, 28 Colo., 110.

With undiminished confidence we rely upon that decision, and the other decisions of like character hereinbefore cited, and assert, without fear of successful contradiction, that the principles there announced are directly applicable to the case here presented, and that the argument founded upon such principles has not been, and cannot be, successfully answered. The controlling constitutional and statutory provisions involved in the Hayes case were much less clear and distinct than the ones hereinabove discussed which are applicable to the cases at bar. It cannot be doubted that the decision in the Hayes case was based upon general principles of the law, as well as upon specific, constitutional and statutory commands; for the court, in the opinion (p. 115) expressly so states. In every one of the cases hereinabove cited and relied upon by us, the statutory command in respect to the manner of submission was much less clear than that here presented, and in some cases it was wholly lacking. The true rule is that a method of submission such as prevailed in the case of section 264A will not be upheld unless expressly authorized.

As was said by Mr. Justice Brewer in Lewis vs. Bourbon County, 12 Kan., 186, 215:

> "A mode of submission which is so obviously unjust, so utterly contrary to the spirit of election, and has received such condemnation from the courts, will not be imputed to the intention of the legislature, *unless necessarily demanded by the language used.*"

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3. *Section 264A Is Void in so far as It Constituted the Election of Anderson, Van Cise and Fellows as Public Utility Commissioners, Because in Contravention of the Charter and Statutes on This Subject.*

Anderson, Van Cise and Fellows were never legally elected members of the Public Utilities Commission, and this contention is presented by paragraph Twelfth of the cross-bill (Trans., pp. 130-131).

Under charter section 178, which has been copied in full at page 218, *supra*, certain general election laws of the State of Colorado became operative. One of these sections, 2235 of the Revised Statutes of Colorado of 1908, has been verbatim copied at pages 219-223, and the other applicable sections are Nos. 2151-2163. These constitute the sole and specific provisions relative to the nomination and election of any and all elective officers in the City and County of Denver.

The requirements are mandatory that a nomination of candidates be made either by petition or convention; that certificates of nomination be filed in

certain offices and within certain times; that lists of nominations be published and posted in a certain manner, so that objections thereto may be filed within a certain time thereafter; that all nominations be accepted in writing, and the acceptance filed in certain offices and within a certain time; that no name of a candidate be placed upon the official ballot unless he shall have been nominated in one of the specific statutory ways; that the names of candidates be separately printed on the ballots, so that they may be separately voted upon; and that blank spaces be provided on the ballot, so that the voter may write in the name of any person not printed on the ballot for whom he desires to vote as a candidate for any office.

Not a single one of these requirements or provisions of the state statutes was complied with in supposedly electing and inducting into office Anderson, Van Cise and Fellows.

The offices for which their names were proposed did not exist at the time of the adoption of section 264A; they were not nominated for office in any manner whatsoever; they never accepted a nomination; no opportunity was afforded to object to their nomination; their names were not printed on a ballot separately or in alphabetical order, or in such a way as to afford an elector an opportunity to vote for one individual and against another.

The following is the manner in which their selection to serve as commissioners was presented to the people by section 264A:

> "Armour C. Anderson, Edwin C. Van Cise and A. Lincoln Fellows are hereby elected as the first members of said commis-

> sion, to serve in the order named from the date of their election to June 1, 1912, June 1, 1914, and June 1, 1916, respectively, and until their successors are elected and qualified."

Is there any valid or legal reason why the statutory provisions and requirements should not have been followed, and why an elector should not have been given a right to vote for or against any one of these individuals, after their nomination had been regularly made and their names legally submitted?

This patent ignoring of statutory provisions is given but scant consideration in the brief on behalf of the City filed in this case in a few paragraphs on page 221; but in prior briefs, and in the various oral arguments, the City, in answer to these objections, has protested that the selection of the three commissioners, Anderson, Van Cise and Fellows, was analogous to the naming of officers to fill a vacancy under the statute creating the office. There is every apparent intent to make the office of Public Utility Commissioner an elective one, and, in fact, the quotation made under this heading states that the three gentlemen named *"are hereby elected,"* not appointed.

The case of State vs. Winnett, 78 Neb., 379; 110 N. W., 1113, has likewise been several times used by the City, although it does not seem to be relied upon at present. The case is not helpful to the City because the stipulation upon which the case was tried is as follows:

> "* * * also shows that the three principal political parties of the state in their state conventions each 'nominated three

> candidates for the office of State Railway Commissioner, and each in its respective platform, duly adopted by said conventions, declared in favor of the approval and adoption of the proposed constitutional amendment, and the declaration became and was made a part of the platforms of these political parties.' "

It appears, therefore, that nominations were duly made, and the names of the candidates placed upon the ballot, in manner and form as required by the statutes of the State of Nebraska, and entirely separate from the question of adopting the measure creating the commission. Plainly, no such question was presented or decided in that case as arises upon the record now before the court. In the course of the opinion it is said (p. 1117):

> "By the same act of the people that made the amendment a part of the fundamental law, and created the office, these respondents were elected to fill that office. Both matters might properly be submitted to the electors at the same election."

But it is manifest that both matters could not, and, in that case, were not, submitted to the electors as part of one and the same proposition to be voted upon as an entirety.

The electors of the State of Nebraska were given the opportunity to vote for the various candidates who had been regularly nominated.

The nominations had been made on the assumption that the act creating a State Railroad Commis-

sion would be passed, and the case would be analogous and helpful if separate nominations had been regularly made for the positions of Public Utility Commissioners, in accordance with the statutes of the State of Colorado, and upon the assumption that section 264A was to be legally adopted.

Under ordinary circumstances it might be stated that the Water Company had but little interest in the question of the legality of the election of Anderson, Van Cise and Fellows, and perhaps that the matter of their right to office could only be questioned in a direct quo warranto proceeding; but here the election of these persons jointly was made an integral part of section 264A, and necessarily affected the remaining portions of section 264A, which dealt with, or assumed to deal with, the property and contract rights of the Water Company.

The City has assumed at different times and at different hearings different attitudes toward section 264A, sometimes maintaining its unity and integrity, while at other times dividing it; and when this division has been contended for, assertion has been made that the creation of a Public Utilities Commission and the election of Anderson, Van Cise and Fellows constituted the principal portion. If this should be true, then, if such election is totally invalid, as we believe we have demonstrated, it invalidates the entire section 264A, and irreparable damages suffered by the Water Company cannot be justified by such illegal action.

4. Section 264A Is Void Because It Conflicts With Article XX of the Colorado Constitution Relative to the Granting of Franchises.

Section 4 of Article XX of the Colorado Constitution contains the following provision:

> "No franchise relating to any street, alley or public place of the said City and County shall be granted, except upon the vote of the qualified taxpaying electors; and the question of its being granted shall be submitted to such vote upon deposit with the treasurer of the expense (to be determined by said treasurer) of such submission by the applicant for said franchise."

Section 5 of the same article requires that when qualified electors, to a certain number, petition the council for any measure, the council "shall submit the same to a vote of the qualified electors," either at the next general election, or, if a sufficient number have signed the petition, at a special election to be called for that purpose.

These constitutional provisions are plainly mandatory. But, notwithstanding the constitutional mandate, section 264A provides:

> "Nothing in the preceding sections, or in this charter, except as herein specifically provided, shall apply to the acquisition or operation of a water works, or supplying the city and County of Denver and its inhabitants with water for all uses and purposes.
> * * *

> Said Commission shall have and exercise all the powers of the City and County granted in the Constitution or named in the charter, in the matter of constructing, purchasing, condemning and purchasing, acquiring, leasing, adding to, maintaining, conducting and operating a water plant or system for all uses and purposes, and everything pertaining or deemed necessary or incidental thereto."

But the Public Utilities Commission is by the section commanded either to purchase the Water Company's plant for $7,000,000 in bonds, or immediately "to construct and put into operation a complete system of water works for supplying said City and County and the inhabitants thereof with water for all uses and purposes."

Upon this language of section 264A, it does not admit of doubt that the City is deprived of all power to grant any franchise to a private individual or corporation for the purpose of furnishing a water supply, either to the City or to its inhabitants. By the direct command of section 264A, that supply must be obtained from a plant owned by the City, and to be procured either by the purchase of the Water Company's property or by the construction of a new plant. How can this be reconciled with the mandatory provision of the Constitution expressly applicable to the City and County of Denver, and requiring that the question of granting a franchise "shall be submitted to such vote [of the electors], upon deposit with the Treasurer of the expense" by the applicant for said

franchise? Or how can it be reconciled with the direct command of the Constitution, whereby the council is required to submit to the electors "any measure" properly petitioned for?. We submit that the two are irreconcilable, and section 264A must fall.

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5. *Section 264A Was Void if It Be Considered as a Charter Amendment, No Charter Convention Having Been Called to Consider It as by the Constitution Provided.*

The Constitution recognizes that an "alteration or revision" of the charter, or an additional or supplemental charter, shall be first submitted to and approved by a charter convention before it can go to a vote of the people.

By section 4 of Article XX of the Constitution the people of Denver were vested with exclusive power "in the making, altering, revising or amending their charter." Clearly, the makers of the Constitution here recognize a distinction between the making of a charter, its alteration, its revision and its amendment. By this section of the article, complete provisions are made for a charter convention, to consider, frame and approve the original charter, and thereafter to submit it to the vote of the people. Clearly, therefore, although the makers of the Constitution intended to introduce the principle of the initiative, yet it was not to have an unrestricted scope, for at least in the making of a charter it was necessary to have the intervention of an elected, representative, deliberative and legislative body, which must first frame and give its approval to the charter before the direct

vote of the people could operate thereon. Thus, in a measure, one of the checks required by a republican form of government was preserved. But did it apply exclusively to the original making of the first charter? Section 5 of Article XX of the Constitution relates to amendments of or changes in the charter. It is there provided: "The citizens of the City and County of Denver shall have the exclusive power to amend their charter * * * as herein provided." Qualified electors may petition the council for a "charter amendment, or for a charter convention," and the council shall submit the same to a vote.

> "Whenever the question of a charter convention is carried by a majority of those voting thereon, a charter convention shall be called through a special election ordinance, as provided in section four (4) hereof, and the same shall be constituted and held and the proposed charter submitted to a vote of the qualified electors, approved or rejected, and all expenses paid, as in said section provided."

But after the adoption of the original charter, what occasion could arise for the calling of another charter convention? Was that to be done only in case an entirely new charter, covering all matters relating to the government of the City and County, was proposed?

We recur again to the language of section 4 of Article XX, wherein the distinction is drawn between making a charter, altering a charter, revising a charter and amending a charter. It will be noted that, in

the provision relative to the initiative, the right to require, by petition, a direct submission to the vote of the people is limited to a charter amendment, or the proposal of a charter convention. What is to be done if the purpose is an alteration or a revision of an existing charter? We submit that this purpose can only be effected through the calling of a charter convention, which must first consider such alteration or such revision.

The broad scope and sweeping character of section 264A has already been noted. It creates the Public Utilities Commission, and purports to vest in that commission all the powers of the City and County of Denver, both legislative and executive, in reference "to the acquisition or operation of a water works, or supplying the City and County of Denver and its inhabitants with water for all uses and purposes." It amends or abolishes all other provisions of the existing charter, relating in any way to a water supply. It deprives the City Council of its rights to legislate, and the mayor, the Board of Public Works, and the other executive officers of the City, of their right to act at all in reference to a water supply. We submit that no such sweeping provision as this was within the contemplation of the makers of the Constitution as being proper to be submitted to direct vote of the people, without the intervention of the legislative consideration and deliberate action of a charter convention. It is obvious that no charter convention would ever have framed any such provision as section 264A and submitted it to the people as a charter amendment.

Unless we are correct in the foregoing construction of Article XX, the only vestige of a republican form of government which seems to have been left by

that article to the City and County of Denver will be swept away. If we are correct, then section 264A must fall.

This identical question has been under consideration by the Supreme Court of the State of Colorado since this litigation was instituted. We refer to the case of Speer vs. The People, 122 Pac., 769, and from which case we have made a quotation at page 231, *supra.*

While the prevailing opinion in this case did not pass upon the merits, an equal number of the judges concurred in a statement of law which plainly showed the requirements of a charter convention.

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6. Section 264A Is Void Because, in Attempting to Acquire a Municipal Water Plant, either by Purchase or Construction, It Failed to Comply with a Single Provision of Article IX of the Existing Charter.

Complete and detailed provisions concerning the acquisition of a public utility by purchase, condemnation, construction or otherwise, are contained in Article IX of the charter of the City of Denver, under the heading "Public Utilities," and comprising sections 252-264, inclusive. These provisions are averred almost verbatim in paragraph Sixteenth of the cross-bill (Transcript of Record, pp. 133-135), and both in this paragraph Sixteenth of the cross-bill and in paragraph Nineteenth of the cross-bill (Transcript of Record, p. 137) the averment is made—and nowhere in this record is it denied—that every single provision of this Article IX has been ignored, and that thereby

both Article XIV of the amendments to the Federal Constitution providing against the denial of equal protection of the laws is violated, and section 264A, is invalid because not in compliance with the city charter provisions.

The subject of the acquiring of a public utility was given the most careful consideration, and both the City and its taxpayers guarded against the hasty and improvident action of those in authority, and the Company whose property it was proposed to acquire was likewise to be protected by a proceeding which required the due ascertainment of the value of its property. The object, then, of Article IX of the charter was twofold: to protect the Company and to protect the public utility.

To ignore these provisions as to the Water Company would, as we shall later demonstrate, violate the Federal Constitution, and to fail to follow these provisions, so far as the city, its inhabitants and its taxpayers were concerned, was to proceed in an otherwise illegal manner, which could be checked by anyone having the requisite interest, and whose property or business was being irremediably damaged. The Water Company, therefore, has the right to protest the validity of section 264A upon both of the above grounds.

Article IX of the charter, as alleged in paragraph Sixteenth of the cross-bill, required the following conditions precedent to the acquirement of a water plant.

First—A petition signed by qualified electors, in number not less than 25 per cent, requesting such acquisition.

Second—The presentation of the same to the City Council.

Third—The direction by the City Council to the Board of Public Works to investigate the advisability of such acquisition, and all costs and expenses which would be incurred thereby.

Fourth—The passage of an ordinance by the council providing for the expense of such investigation.

Fifth—A careful investigation by the Board of Public Works as to the following matters:

(a) Whether and how such public utility may be acquired.

(b) At what probable cost, and the preparation by the board of preliminary specifications for that purpose.

(c) Whether, if acquired, it can be operated by the City at a profit or advantage.

Sixth—A report by the Board of Public Works, after such investigation, to the mayor and council; its findings in the premises, together with all the facts upon which such findings are based.

Seventh—If such report be specific in the points mentioned above, and favorable in its character, the opinion of the city attorney upon the legal questions involved must be obtained.

Eighth—If the city attorney's opinion be favorable, the mayor must endorse his concurrence or nonconcurrence upon the same.

Ninth—With such endorsement it shall be returned to the Board of Public Works, which shall make final estimates, with full specifications, plans and details, and shall prepare and recommend to the council a bill for an ordinance, which must be specific in its character as to the description of the utility,

the total maximum estimated cost, the manner in which it is to be acquired, the maximum amount of bonds to be issued, the time when such bonds shall mature, and the rate of interest thereon; and which shall provide for the acquisition of the public utility in the manner so stated, and at not to exceed the total maximum cost therein mentioned, and not otherwise.

Tenth--Action by the council thereon.

Eleventh—If the council's action be favorable, submission to vote of the people of the question of issuing the necessary bonds.

No attempt whatever was made by the City to comply with these provisions prior to or at the time of the supposed adoption of section 264A.

There certainly can be no doubt that section 264A had, as its object, the acquisition of a public utility—to-wit, a water plant—whether it was to be by purchase or by construction. And it makes no difference, under the terms of Article IX of the charter, whether the acquisition was to be by purchase or construction. Certainly there was to be created a bonded indebtedness of $8,000,000 for one or the other of these uses, section 264A containing the following:

> "The City and County of Denver * * * does hereby authorize the creation of an indebtedness in the sum of $8,000,000 to provide a municipal water plant or system and everything incidental or necessary thereto for supplying the City and County and its inhabitants with water for all uses and purposes."

Absolutely the sole authority for the creation of such a bonded indebtedness for such a purpose was contained in Article IX of the charter, whose provisions were entirely ignored.

Then, proceeding, section 264A provided that in case the Water Company accepted the offer of $7,000,000 on behalf of the City for the purchase of the plant which had been appraised at $14,400,000, the contract was to be *ipso facto* concluded. In other words, the adoption of section 264A and its acceptance by the Water Company constituted the contract of purchase without further negotiation or proceedings. Should the Water Company, however, refuse the offer of $7,000,000, the proceeds of the $8,000,000 bond issue should be devoted to the construction of an independent municipal plant, without further authorization or proceeding. Section 264A, then, was the complete authority in itself for either the purchasing or constructing of a water plant.

Although there is no express repeal of Article IX of the charter in section 264A, but simply a transfer of all powers thereunder to the newly created Public Utilities Commission, the City has contended, and now contends, at pages 220-221 of its brief, that the inconsistent provisions of Article IX are, by implication, repealed through the adoption of section 264A. Granting even this contention, the provisions of Article IX were valid and mandatory until section 264A was adopted. No denial is made of the right, in a legal way, to amend or repeal the provisions of Article IX of the charter, but until this is done such provisions must be complied with.

It would be impossible to act under the amended provisions before they had been legally adopted. The

vice lies in the fact that section 264A not only contemplated amending the provisions of Article IX of the charter, but acting under such amendments before adopted. It must be remembered that section 264A in and by itself constituted the attempt to acquire a public utility, and this action was consummated at the same time section 264A was supposed to have been adopted.

Section 264A did not even attempt to prescribe general rules for the acquirement of public utilities, but only the method by which the property of the Water Company could be appropriated or a competing water plant established.

The comparison made by counsel for the city, at page 220 of its brief, between this contention of ours and the relation of Amendment XII of the Federal Constitution to Article II, section 1, clause 3, is not even specious. The comparison would have added more force and vigor if Amendment XII, aside from changing the *modus operandi* of electing a president, had declared a certain person to be thereby elected president; and it may be remarked that up to the time of the adoption of Amendment XII of the Federal Constitution, the provisions of Article II, section 1, clause 3, must have been and were closely followed. Counsel omitted a consideration of the obnoxious feature—to-wit, the acting under the amendment before it was adopted.

A somewhat similar attempt was made in the case of Smith vs. The State, 28 Okla., 235; 113 Pac., 933, 944. There an attempt was being made, among other things, by an initiative measure, to remove the state capitol, and the procedure by which

this was being done was contained in the measure which was undergoing adoption. The court says:

> "But a measure proposed by an initiative petition can no more prescribe a rule of action prior to the time it is adopted by the people, than a proposed bill in a Legislature prior to the time it receives the sanction of that body. To hold otherwise would render unnecessary any statute prescribing a procedure for the enforcement and application of the initiative provisions of the Constitution, for each proposed initiative measure might provide by its own provisions the method of its submission and all statutes be ignored."

Claiming, as the City does, that under the warrant of section 264A it is justified in issuing $8,000,000 of bonds and use them to acquire a water plant, either by purchase or construction, the duty certainly is incumbent upon it to give some reason why the mandatory detailed provisions of an entire article of the city charter were ignored, especially when such action is to throw to the winds the safeguards on such an important subject given to both the City and its inhabitants, and the public utilities within its confines.

7. *Power of the Federal Court to Hear and Determine the Objections to Section 264A, Contained in Foregoing Subdivisions 2 to 6, Inclusive.*

Can the validity of section 264A be adjudicated in the federal courts upon the so-called local objections? These local objections are embraced in the foregoing subdivisions 2 to 6, inclusive, of Part II of this brief. The City contends these issues are solely determinable by the state courts. We believe the rule well established that, once the jurisdiction of federal courts attaches, the jurisdiction is complete and coextensive with the entire controversy.

The federal questions are not alone singled out for adjudication, but even if the federal questions are resolved against the complainant, other local questions will be taken up and determined. This rule has had its latest enunciation in the case of *Siler vs. Louisville & Nashville R. R. Co.*, 213 U. S., 175, the court, through Mr. Justice Peckham, stating the rule:

> "The Federal questions, as to the invalidity of the state statute because, as alleged, it was in violation of the Federal Constitution, gave the Circuit Court jurisdiction, and, having properly obtained it, that court had the right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only.
>
> This court has the same right, and can, if it deem it proper, decide the local ques-

> tions only, and omit to decide the Federal questions, or decide them adversely to the party claiming their benefit. Horner v. United States (No. 2), 143 U. S. 570, 576; Fallbrook Irrigation Dist. vs. Bradley, 164 U. S. 112, 154; Penn. Mutual Life Insurance Co. vs. Austin, 168 U. S. 685, 695; Burton v. United States, 196 U. S. 283, 295; Williamson v. United States, 207 U. S. 425; People's Savings Bank v. Layman, 134 Fed. Rep. 635; Michigan Railroad Tax Cases, 138 Fed. Rep. 223. Of course, the Federal question must not be merely colorable or fraudulently set up for the mere purpose of endeavoring to give the court jurisdiction. Penn. Mutual Life Insurance Co. vs. Austin, 168 U. S. 658, 695; Michigan Railroad Tax Cases, 138 Fed. Rep. 223, supra."

Incidental to the contention of the City on this subject, reference is made to three certain mandamus proceedings which had been pending in the District Court of the City and County of Denver (City's Brief, p. 198). The reference to these cases is entirely *de hors* this record and has no proper place either in the City's brief or in our own, but, having been referred to by the City, we believe we have the privilege of correcting the erroneous statements made in connection with these cases.

In the first place, the Water Company was not a party to such mandamus cases, but the proceedings were between the public utilities commissioners and the auditor and treasurer of the City. The utilities

commissioners were represented by some of the present counsel for the City, and the then city attorney represented the auditor and treasurer and asserted the utter invalidity of section 264A. Whatever might have been the outcome of these cases, the Water Company could not have been affected by it, although it is true that by counsel as *amici curiae* it offered its services in assisting in the solution of the legal problem.

But incidentally these mandamus proceedings were never permitted to proceed to a final conclusion.

The state District Court, as a nisi prius court, mandamused the auditor and treasurer to proceed to the payment of certain accounts, but, as this court will readily understand, this order did not necessarily involve the validity of section 264A in any part, much less as a whole. Writs of error were immediately taken by the then city attorney himself to the state Supreme Court. The writs were briefed, and orally argued, and when the Supreme Court of the State of Colorado was about to decide these appellate proceedings, there having been a change in the city attorney, the present city attorney, Mr. William H. Bryant, dismissed the writs of error as his first official act as the new city attorney, thereby preventing an imminent decision of the state Supreme Court, which might have set at rest the validity of section 264A. Mr. William H. Bryant was and is the partner of Governor Charles S. Thomas and William P. Malburn, both of whom were counsel for the Public Utilities Commission in these mandamus proceedings. We therefore have the condition of the city attorney reversing the proceedings of his predecessor in office

and dismissing a writ of error in which his law partners were on the opposing side, and all of which prevented the final determination of an issue important to the City and its inhabitants. From such a condition of facts we do not believe that the City can derive either satisfaction or comfort in the present suit. It is perhaps unnecessary to also suggest that nothing less than the decision of the highest appellate state court, even upon local matters and laws, is binding upon the federal courts, and particularly this court, especially when the same questions were pending for determination in the federal court about six months prior to the institution of the state proceedings.

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8. *Section 264A Is Void Because It, and the Acts of the City Thereunder, Amount to a Denial of the Equal Protection of the Laws Guaranteed by the Fourteenth Amendment to the Federal Constitution.*

Article IX of the charter provided a detailed but general method for the acquirement of any public utility—including, of course, a water plant—either by purchase or by construction. The provisions of this article we have just discussed in demonstrating that section 264A deliberately violated every requirement thereof, and for such reason was invalid under common and local laws; but aside from this invalidity, for federal reasons, section 264A contravenes the Federal Constitution, and denies to the Water Company the equal protection of the laws, in that the Water Company alone, of all public utilities in the City and County of Denver, is singled out for appropriation

and denied that protection afforded by Article IX of the charter to all other public utilities, and, in fact, to any other water company.

By section 264A all powers under Article IX of the charter are transferred to the Public Utilities Commission, but they are left in full vigor; and if the City were to attempt to acquire a gas or light plant, or to engage in the telephone business, such plants could only be acquired under the provisions of Article IX. At the same time the Water Company is singled out by name, and arbitrary proceedings entirely different from those prescribed in Article IX are adopted, either to acquire its plant or to put in operation a competing municipal water plant.

What is the legal distinction between acquiring a water plant and a gas plant? And if a water plant is to be acquired, why should the plant of the Water Company be acquired in any different manner from the plant of any other water company? Yet this is exactly what section 264A does when it is compared with the provisions of Article IX concerning other public utilities. This is a denial of equal protection of the laws.

But from another point of view equal protection is denied. The provisions of Article IX of the charter constitute essential steps necessary to be taken whenever it is proposed to condemn or otherwise acquire any property privately held, but devoted to uses commonly designated as "public utilities." These prerequisites, according to the language of Article IX, must be observed by the City in respect to all such property, no matter by whom owned; they are protection to the City and its inhabitants, because there-

by a hasty and ill-advised action will be avoided; but they are equally a protection to the owners of the property proposed to be taken—as much so as any provision in any law relative to the exercise of the power of eminent domain.

The taking of private property *in invitum* for public purposes is an extreme exercise of governmental power, and no safeguard which conditions it should be denied; but by the provisions of section 264A the safeguards provided by Article IX, and which still relate to all property except that of the Water Company, are entirely denied in respect of property used as a water plant. It is as though a general eminent-domain act had provided that in respect of all property except that of a waterworks company certain notices, the consideration and approval of certain officers and bodies, and preliminary valuation thereof, should be prerequisites to its condemnation: whereas, as to the property of a waterworks company it might be taken or destroyed, or its value greatly impaired, without the observance of any such general prerequisites.

Or, to take another view of the situation: Section 264A undoubtedly purports to deprive the City and County of Denver of the power to grant to any person or corporation a franchise in respect to supplying water to the City and its inhabitants; whereas, the power in the City to grant, and the right of a corporation to obtain, such a franchise relating to the supply of gas, electricity or transportation, is still afforded. We submit that there is no reasonable ground upon which such discrimination against the Water Company, or against any water companies, can

possibly be sustained. This discrimination is not slight or unimportant; it is far-reaching and disastrous in its consequences to the Water Company.

It was said in Cooley's Constitutional Limitations, fifth edition, 484, 486, and quoted with approval in Cotting vs. Kansas City Stock Yards Co., 183 U. S., 79, 109:

> "Every one has a right to demand that he be governed by general rules, and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments."

In Chicago, Milwaukee & St. Paul vs. Westby, 178 Fed., 619, the subject was thoroughly examined and the rules applicable thereto clearly announced by the court. In that case the court considered and condemned a statute of South Dakota which made all common carriers liable for personal injuries to their employes, in cases where others not common carriers would not have been so liable. Judge Sanborn, speaking for the court, laid down the following governing principles (p. 624):

> "In the face of the constitutional prohibition of unequal laws, there are three indispensable conditions to a constitutional imposition of liabilities or burdens upon, or a constitutional grant of rights or privileges to, the members of one class that other mem-

bers of the state do not bear or enjoy: (1) There must be such a difference between the situation and circumstances of all the members of the class and the situation and circumstances of other members of the state in relation to the subjects of the discriminatory legislation as presents a just and natural reason of necessity or propriety for the difference made by the law in their liabilities and rights. While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial disinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification. [Citing cases.] (2) No person who does not belong to the class may be included therein, and all persons within the influence of the legislation relative to the class must be treated alike thereby. (3) All who are in a situation and circumstances relative to the subject of the discriminatory legislation indistinguishable from the situation and circumstances of the members of the class must be brought under the influence of the legislation and treated by it in the same way as are the members of the class."

But in respect to the taking of their property *in invitum*, what possible distinction can there be between The Denver Union Water Company and all other water companies? Or what possible distinction can there be between the taking of the property devoted to waterworks purposes, and the taking of property devoted to other purposes of a public nature? We submit that there is no such distinction possible, in view of the object of the legislation, which is the acquisition by condemnation or otherwise of a public utility. The necessary limits of this argument will not, of course, permit us to devote the space to this question which its importance deserves. We cannot do more than cite the following recent decisions of the Supreme Court of the United States, wherein the subject is fully discussed and the preceding cases cited:

Gulf, Colo. & Santa Fe vs. Ellis, 165 U. S., 150.

Connolly vs. Union Sewer Pipe Co., 184 U. S., 540, 552, *et seq.*

Southern Ry. Co. vs. Green, 216 U. S., 400.

The only answer to this contention is contained on p. 222 of the City brief, where it is claimed that under the General States of Colorado the limit of municipal indebtedness does not apply to the acquirement of a water plant. We must remember that the charter of the City of Denver, including Article IX, constituted a complete code governing the municipal acquirement of public utilities, including water plants, and not discriminating against them. There may be many distinctions between a water plant and

other public utilities, the basic one, of course, being the difference in the commodity which they supply; but certainly, when it comes to their acquirement by the City, there is no legal reason why a water company should be singled out for harmful discrimination. The basis for the foregoing discussion will be found in paragraph Sixteenth of the cross-bill (Transcript of Record, pp. 133-135).

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9. Section 264A Is Void Because It, and the Acts of the City Thereunder, Constituted a Deprivation of Property Without Due Process of Law, Contrary to the Fourteenth Amendment to the Federal Constitution.

As was explicitly alleged in the cross-bill, and heretofore reiterated by us, the acts of the City and its officers, including the Public Utilities Commission, were preconceived, deliberate, systematic and malicious, having for their object either the utter destruction of the Water Company's property, or such impairment of its property as to force the Water Company to sell it at a grossly inadequate price. Such conduct will not be tolerated unless the rights of the City are clear and unless the method by which it proceeds is constitutional and valid. As part of this scheme, section 264A was adopted, and its provisions are calculated to accomplish the desired result.

The character of the acts of the City and its officers, and the nature of the provisions of section 264A which are complained of, are fully set forth in other portions of this argument, and will not be here repeated. They present a situation which, unfortu-

nately, has in the past been so frequent under like circumstances as to become the subject of comment by text-writers.

In 2 Abbott's Municipal Corporations, section 457, page 1155, it is said:

> "The specific grant of the power to establish and maintain a water supply has been held to include the power to purchase from private persons a plant wholly or partially constructed and in operation. When this right is available, municipal authorities often endeavor to drive a bargain and force a sale, by the private company, of its plant, by refusing to pay a fair value, the interests of bona fide investors suffering by the transaction. It has been held that such a proceeding is a taking of property without due process of law. Such a forced sale is generally sought to be effected by either the threat of competition, a refusal to extend a franchise for no good or sufficient reason but that of compelling the private corporation to come to its terms or by failing to pay water rentals due under legal contracts making fictitious objections to the quality or quantity of a water supply with the purpose of creating litigation in order to effect the same purpose."

In Laighton vs. City of Carthage, 175 Fed., 145, Judge Phillips was considering a case wherein a water company's contract and also its street rights had unquestionably terminated. The city was proceeding

to build a municipal water plant, but meanwhile was insisting that the water company should continue to supply water. The water company desired to withdraw from the business and devote its property and its capital to other enterprises. This the city was endeavoring to prevent by various forms of litigation, by threats and otherwise. Judge Phillips denounced the conduct of the city in most vigorous language; among other things, he says (pp. 151, 152):

> "It could not convert its own delinquencies into an equitable right to compel, on its own terms, the company to maintain and operate its plant, furnishing it and its inhabitants water until, in its own way and time, it could complete its water works, and then challenge the company's right to use its streets, either in furnishing private consumers water, or to remove its plant. * * *
>
> Doubtless this court, by its action in the premises, will incur denunciation from the people who may suffer from the hand of the law. But as the law is 'a rule of action prescribing what is right, and prohibiting what is wrong,' the court must follow where it leads, regardless of personal consequences to the mere minister of justice.
>
> * * * * * *
>
> Such litigation might be interminably multiplied and indefinitely prolonged, during which the defendant will have completed its own water plant, compelling in the meantime the complainant to furnish it water, with or without loss to him. No more effect-

> ual means could be devised, without pecuniary liability on the part of the city, for the wrong done the complainant than this proposed scheme. Short, indeed, would be the arm of this court, if it could not reach out its protecting hand to relieve a suitor, under such circumstances, from such gross injustice."

Any action of a state or of any municipality, commission or other body, or officer or agency of a state, purporting to act under state sanction, which results in a taking of property, or in its destruction or substantial impairment without due process of law, violates the provision of the Fourteenth Amendment. It is, of course, unnecessary that the state action should be legislative in character.

> Raymond vs. Chicago Union Traction Co., 207 U. S., 20, 35.
>
> Ex parte Young, 209 U. S., 123.
>
> Riverside Company vs. City of Riverside, 118 Fed., 736.
>
> First State Bank vs. Shallenberger, 172 Fed., 999.

A case presenting facts quite similar in some aspects to the case at bar was considered by the Supreme Court in Dobbins vs. Los Angeles, 195 U. S., 223. It was there charged in the bill that a certain ordinance passed by the city of Los Angeles and certain acts of the city authorities were part of a scheme devised for the purpose of depreciating the value of complainant's property, used as a gasworks, and

forcing a sale thereof at an inadequate price. The lower court had sustained a demurrer to the bill, so that there, as here, the allegations necessarily were taken as true. The court says (p. 239):

> "This action is strongly corroborative of the allegations of the bill that the purpose was not police regulation in the interest of the public, but the destruction of the plaintiff's rights and the building up of another company still within the privileged district after the passage of the amendment. * * *"
>
> (P. 240): "Could it be successfully maintained that after the erection of the works and the fixing of prices for a term of ten years, at the expiration thereof and exercising the right to fix prices for a new term, the Council could arbitrarily, and with a view of compelling the sale of the works to the municipality or a rival company, fix the rate at a price below the cost of gas to the producer and at such a rate as to be ruinous to the business? * * *"
>
> (P. 241): "In this case we think the allegations of the bill disclose such character of territory, such sudden and unexplained change of its limits after the plaintiff in error had purchased the property and gone forward with the erection of the works, as to bring it within that class of cases wherein the court may restrain the arbitrary and discriminatory exercise of the police power which amounts to a taking of property with-

> out due process of law and an impairment of property rights protected by the Fourteenth Amendment to the Federal Constitution."

Under the provisions of the Fifth Amendment to the Federal Constitution, which applies to national action like restrictions to those which are, by the Fourteenth Amendment, directed to state action, the Supreme Court of the United States, in Pumpelly vs. Green Bay Company, 13 Wall., 166, has held that any act or series of acts which constitutes a substantial impairment of the value of property, if done without due process of law, is violative of the Constitution; the court saying (p. 177):

> "It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest

> sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

The only answer to this contention is the citation of the case of Knoxville Water Company vs. Knoxville, 200 U. S., 22, at page 222 of the City's brief, and a reiteration of the statement that the construction and maintenance of a municipal plant is not of itself depriving a water company of its property. It is not the construction of the municipal plant which deprives the water company of its property when the city is proceeding legally, but when it is proceeding illegally and thereby damaging, not necessarily the physical property, but the property right of doing business, that the Fourteenth Amendment to the Federal Constitution becomes applicable.

III.

CONTENTIONS OF PETITIONERS RELATIVE TO THE CROSS-BILL AND THE CASE MADE THEREBY.

1. Contention that the Cross-Bill Cannot Be Sustained as a Taxpayer's Bill.

This contention is set forth at pages 199-203 of petitioners' brief. It is asserted (p. 203) that the cross-bill cannot be sustained as a taxpayer's bill, because it alleges no damage to the Water Company distinct or separate from that common to every other taxpayer in the City, nor is it brought for all others similarly interested as well as for itself.

We cannot believe that this contention is seriously asserted. The damage to the Water Company consists in its attempted exclusion from the business in which it is engaged and the utter destruction of its property as a water plant, in addition to the imposition of an illegal tax, the proceeds of which are to be used to accomplish its destruction.

It is alleged in the twenty-fifth paragraph of the cross-bill (Record, p. 142) that the Water Company pays about 2 per cent of all the taxes collected in the City and County of Denver, by reason of which it would be compelled to contribute at least one hundred and fifty thousand dollars to the sum which the City proposes to collect for the construction of an independent and competing plant. But if cross-complainant's contentions are correct, then section 264A, which constitutes the sole basis under which all of the threatened acts of the City are attempted to be justified, is entirely invalid. This would invalidate both

the tax and the purposes for which the tax was imposed.

It would seem to be clear beyond question that the City may not undertake a series of acts which will destroy the property of the Water Company, and at the same time, through the medium of taxation, require the Water Company to furnish, in large measure, the funds with which its destruction is to be accomplished, without affording to the Water Company a cause of action and a reasonable ground of complaint respecting anticipated damage which is distinct and separate from that common to other taxpayers in the City.

The court, having obtained jurisdiction of the cause for one purpose, will surely retain it for the purpose of considering and determining all of the contentions of the respective parties.

The contention that under the circumstances the bill must be brought for all others similarly interested, as well as for itself, is equally untenable.

Pomeroy's Equity Juris. (3rd Ed.), Vol. 1, sec. 260, p. 404, and p. 408, note.

Knopf vs. First Nat'l Bank, 173 Ill., 331; 50 N. E., 660.

Jordan vs. Logansport, 171 Ind., 280; 86 N. E., 47.

Curtenius vs. G. R. & S. R. R., 37 Mich., 583.

Snyder vs. Foster, 77 Ia., 638; 42 N. W., 506.

Cascaden vs. Waterloo, 106 Ia., 673; 77 N. W., 333.

Chicago vs. Nichols, 177 Ill., 97; 52 N. E., 359.

Bradford vs. San Francisco, 112 Cal., 537; 44 Pac., 912, 914.

City vs. McCall, 95 Tex., 565; 68 S. W., 791, 794.

Wright vs. Bishop, 88 Ill., 302.

Webster vs. Harwinton, 32 Conn., 131.

Crampton vs. Zabriskie, 101 U. S., 601, 609.

Davenport vs. Buffington (C. C. A., 8th Cir.), 97 Fed., 234.

It is equally clear that interposing this ground of relief does not render the cross-bill multifarious.

In Davenport vs. Buffington, *supra*, several complainants joined, one of whom was a taxpayer, and relief was sought both on the ground of threatened injury to the taxpayer as such, and also on the ground of threatened injury to the other complainants in a different capacity. The bill was sustained by this court.

In Westinghouse Air Brake Co. vs. Kansas City Southern Ry. Co., 137 Fed., 26 at 31, the court defines multifariousness as

> "the union of causes of action which, or of parties whose claims, it is either impractical or inconvenient to hear and adjudicate in a single suit."

And in that case and other cases the courts have frequently pointed out the desirability and necessity of

uniting in one suit all of the claims which a party may have to a single form of relief.

And in Jones vs. Missouri Edison Co., 144 Fed., 765, 780, and Rogers vs. Penobscot Mining Co., 154 Fed., 606, it was held that a bill was not rendered multifarious either because a complainant had joined grounds of relief accruing to him in two different capacities, or because he had joined grounds of recovery against a defendant in different capacities.

As to the question of non-germaneness, that will be fully discussed in the next subdivision of this argument. But the exact question was determined against appellants' contention in Farmers Loan & Trust Co. vs. City of Sioux Falls, 131 Fed., 890, at 902.

It seems to us unimportant whether the original complainant did or did not in its original bill refer to the matter of taxation; but, in any event, it was referred to and made a ground of the Trust Company's complaint by the averments of paragraph Nineteenth, at page 26 of the printed record. We submit that, from any point of view, this contention of appellants is manifestly without merit.

At page 200 of petitioners' brief, quotation is made from the brief of the Water Company filed in the Circuit Court of Appeals. That quotation should not be considered except in connection with its context.

The contention made in the Circuit Court of Appeals was precisely that now made in this court—namely, that the Water Company, in connection with its other equities, was entitled to present its equity as a taxpayer, and that the court should afford relief on that account, as well as for the other reasons set forth in the cross-bill.

2. Petitioners' Contention that the Cross-Bill Is Improper Because Not Germane.

This contention is suggested, rather than argued, at pages 201 and 202 of petitioners' brief. It is there suggested that the cross-bill is germane only so far as it "is based upon the same contract and the same impairment" alleged in the original bill, but that as to any other matter therein set up, although it relates to the same property, it is non-germane, and therefore an improper cross-bill.

As a corollary to this, it is suggested that, inasmuch as, according to petitioners' contention, the objections to the validity of section 264A can only be urged by the Water Company in its capacity as a taxpayer, therefore none of said objections may be considered by the court.

Counsel obviously take too narrow a view of the office of a cross-bill. They fall into error by confusing the cause of action of the original bill with the subject-matter involved. The subject-matter involved by the original bill was the property rights and contract rights of the Water Company (in which the Trust Company was interested as mortgagee and trustee), and their protection and enforcement.

The cross-bill relates to the same subject-matter; indeed, it is founded upon the same ordinances and contracts alleged in the original bill. It attempts to enforce, both against the original complainant and against the City, a different right arising therefrom, but relating to the same property which was the subject-matter of the original bill; and from that point of view it undertakes to protect and conserve the property rights involved.

The theory of the cross-complainant in respect to the contract rights, and the relief which it seeks in regard thereto, are of such a nature that, if it should succeed, the original complainant must necessarily fail, for there cannot at one and the same time be both a sale and conveyance of the property to the City, and the continued possession and operation thereof by the Water Company for an additional period of twenty years. On the other hand, the theory of the original complainant as to the contract rights is such that, if it should fail, the result would be a determination which would in equity entitle the cross-complainant to affirmative relief. From any point of view, the cross-complaint was authorized by the equity practice, and its propriety cannot be successfully challenged.

In Story's Equity Pleadings, eighth edition, page 369, it is said that a cross-bill may be brought

> "to obtain full relief to all parties, touching the matters of the original bill.
> * * * * * * * *
> (P. 370): "It also frequently happens, and particularly, if any question arises between two defendants to a bill, that the court can not make a complete decree without a cross bill, or cross bills, to bring every matter in dispute completely before the court, to be litigated by the proper parties, and upon the proper proofs."

In Bates on Federal Equity Procedure, section 376, the author states:

> "It is said in some of the adjudicated cases that the cross-bill must be germane to

the original bill; this is only a different mode of stating the principle that the cross-bill should not introduce new and distinct matters not embraced in the original bill, but that it must be restricted to the matters in question in the original bill. The rule does not mean that the cross-bill should state no facts not stated in the original bill, nor does it mean that the plaintiff in the cross-bill can assert no rights in the subject-matter of the original suit not conceded to him in the original bill; for if such were the meaning of the rule, a cross-bill would be utterly useless and nugatory. All that is required is, that the cross-bill shall not go outside of the matters embraced in the original bill, and introduce new and distinct matters not involved in the original suit. But the plaintiff in the cross-bill may allege additional facts connected with the subject-matter of the original, and may assert any rights he may have in the same arising out of the facts so alleged, and pray for the appropriate relief. While it is true that the cross-bill must grow out of the matter alleged in the original bill, it is also true that the very object and purpose of the cross-bill is to bring the whole matter in dispute before the court, so that there may be a complete decree touching the subject-matter of the suit, and full and complete justice done to all the parties; and if the plaintiff in the original bill does not fully state all the facts and cir-

> cumstances connected with the subject-matter in controversy, but omits facts which, if alleged, would show a right in a defendant, entitling him to relief against either the plaintiff or a co-defendant, such omitted facts, however extended and voluminous, may be stated by the defendant in a cross-bill, and the appropriate relief demanded; for it is always the purpose of a court of equity to do full and complete justice to all the parties touching the matter in dispute brought before it by the original bill, and to put an end to the litigation; and the court will, of its own motion, in a proper case, direct a cross-bill to be filed, for the purpose of developing the whole case, and showing the rights of all the parties, and to enable it to decide upon them and make a complete decree."

In Langdell's Equity Pleadings, section 155, quoted with approval in Foster's Federal Practice, fourth edition, section 170, it is said:

> "If the facts which a defendant wishes to set up destroy the plaintiff's apparent cause of action, they constitute a defense, and should be set up by answer or plea; but if they only furnish a reason why the court should make a decree depriving the plaintiff of his cause of action, they must be set up by a cross-bill."

In Street's Federal Equity Practice the learned author says (sec. 1020):

"The two chief ends of the cross-bill are, to secure affirmative relief to the defandant in regard to the matters in controversy, and to obtain a complete determination, among all the parties, of all the elements of dispute involved in or connected with the suit."

* * * * * *

(Sec. 1021): "One who is entitled to file a cross-bill in a particular suit, being a proper party and having an interest to be protected by affirmative relief in his favor, should seek that relief by cross-bill; and the court having jurisdiction of the original suit may refuse to entertain an original bill filed in that court to get the same relief. The idea is that the whole controversy should be considered and determined in the first suit."

* * * * * * * *

(Sec. 1034): "In large and complicated litigation the desirability of determining the details of the controversy in all its aspects in one suit is rightly given much weight. Here the court will allow issues to be brought in by cross-bill which in a narrow view might be considered not germane to the original bill, which, under other conditions, would be held to supply matter for an original suit only."

* * * * * * * *

(Sec. 1037): "Between the situation where a cross-bill will clearly be entertained because of the close connection of its subject-

matter with that of the original bill and the situation where it will clearly not be entertained because of the remoteness of that connection, there is a considerable margin where considerations of mere convenience must be allowed to control. Original bills between the same parties and concerned with kindred matters are often consolidated and heard together, even though they are not connected as bill and cross-bill; and there is no reason why it should not be tolerated sometimes to entertain suits as bill and cross-bill, though the subject-matter of the purported cross-bill is not wholly germane to the original bill. Undoubtedly this is permissible under certain conditions, but a point of some importance is that such a purported cross-bill must be considered and treated as an original bill. A purported cross-bill that is not entirely germane is really a cross-bill in the nature of an original bill."

(Sec. 1038): "Advertence to the distinction between the true cross-bill and the cross-bill in the nature of an original bill goes far to explain much of the lack of harmony in judicial discussions of the subject of cross-bills; and recognition of the distinct status of the cross-bill in the nature of an original bill will go far to relieve the topic with which we are now dealing of some real difficulties. Before a bill can be considered a true cross-bill certain technical conditions must be fulfilled. It must be concerned with

the same subject-matter as the original bill, and it must be between the parties to the original suit and none others.

The cross-bill in the nature of an original bill is not restricted to these bounds. In such a bill, a new party may be brought in and matters may be litigated that are not exactly germane to the cause stated in the original bill. The only limit here is that which the judicial discretion of the court sees fit to interpose; and, of course, this liberality of practice is only indulged where there is some proper end to be subserved by allowing such a proceeding."

In Rickey Land & Cattle Co. vs. Miller & Lux, 218 U. S., 259, the Supreme Court of the United States was considering a case in which Miller & Lux had brought a bill seeking to enjoin interference by the defendants with their use of water from a certain stream. Some of these defendants brought a cross-bill against one of their co-defendants, to establish their priority to the use of water as against said co-defendant. At page 263 the Supreme Court says:

"It is urged that the cross-bills on which the bill and injunction in the second case were based were not maintainable because not in aid of the defenses to the original suit of Miller & Lux. But it might very well be, as was shown by the argument for the respondents, that even if they admitted the right of Miller & Lux, still a decree as between themselves and other defendants

would be necessary in order to prevent a decree for Miller & Lux from working injustice. See further, Ames Realty Co., vs. Big Indian Mining Co., 146 Fed. Rep., 166."

In the case cited by the Supreme Court, and to which we are by the highest authority directed for a correct exposition of the law relating to cross-bills, the Ames Realty Company had filed a suit in equity to establish and protect rights in the waters of a stream against other separate appropriators of water from the same stream, a large number of whom were made defendants. Some of these defendants filed cross-bills against other defendants, setting up their respective priorities as against the other defendants. The court held that they were properly filed and were maintainable, since they related to the subject of the original suit, which was the water of the stream. After announcing as a settled rule the doctrine that a cross-bill is maintainable if it relates to matters connected with the subject-matter of the original suit, the court proceeds as follows (p. 170):

"What, then, are matters directly connected with the subject-matter of the original suit? In proceeding to a brief analysis, let us not confuse the question by misunderstanding the object of the action. The complainant herein, the Ames Realty Company, prays for a decree fixing its rights to the use of 404 inches of the waters of Prickly Pear creek, and for injunction restraining all defendants who claim rights from diverting water until complainant's prior rights are

satisfied. The object of this action is, therefore, what the Ames Realty Company endeavors to obtain—a decree that it is entitled to the prior use of 404 inches of water, and an order of court which will prevent all defendants from interfering with it in the enjoyment of such prior right of use. Plainly, therefore, the object of the action is the remedy asked, and which may be finally awarded. It is something ahead—a future result—which is sought. This object, however, is something apart from the subject-matter of the suit, and, as said, the subject-matter being the point which we are here inquiring into, let us proceed further. Substantial accord is to be found among the books in the discussion of what is meant by the subject-matter of the action. It is scarcely necessary to state that clearly it is not the cause of action here, for the cause of action springs out of the primary lawful rights of the Ames Realty Company to the use of 404 inches of the waters of Prickly Pear creek, the duty of the defendants not to interfere with such right, and the breach thereof by the improper diversion of water by the defendants in the modes described in complainant's bill. These elements constitute the cause of action, and from them the Ames Realty Company's right of action has arisen. Speaking exactly, the subject-matter involved is the right to use the physical thing—the flowing water—susceptible of use for wetting the lands belonging to the Ames

> Realty Company and other owners. 'Subject-matter of the action,' writes Pomeroy on Code Remedies, section 369, 'rather describes the physical facts, the things real or personal, the money, lands, chattels and the like in relation to which the suit is prosecuted.'
> * * * * * * * *
> The right of use of the physical thing becomes, in these water right cases, so identified with the water, that in ascertaining by strict analysis what is the subject-matter of the action, we find that the water itself is that in relation to which complainant prosecutes its suit, and so the water really becomes the subject of the action, in so far as there is a thing physical or real involved in the suit."

And so the cross-bills setting up the respective rights of defendants as against one another, to the use of the waters of the stream, were sustained.

It will be observed that, under the doctrine announced in the foregoing authorities, the test to be applied is whether the cross-bill relates to the subject-matter of the original bill.

Professor Pomeroy, in his work on Code Remedies, third edition, section 475, says:

> "'Subject of action' must, therefore, be something different from 'cause of action.' It is also different from 'object of the action.' The object of the action is the thing sought to be attained by the action, the remedy demanded and finally awarded to the plaintiff. * * * The phrase was not used in legal

terminology prior to the code, but another one very similar to it was in constant use, and had acquired a well-defined meaning; namely, 'subject-matter of the action.' Thus the rule is familiar, that courts must have jurisdiction of 'the subject-matter of the action,' as well as over the parties. Courts might have the power in a proper case to grant any kind of relief, legal or equitable, and to entertain any form of proceeding, and yet not have jurisdiction over some particular 'subject-matter.' * * * 'Subject-matter of the action' is not the 'cause of action,' nor the 'object of the action.' It rather describes the physical facts, the things real or personal, the money, lands, chattels, and the like, in relation to which the suit is prosecuted."

In Railroad Company vs. Schuyler, 17 N. Y., 592, the court, speaking of a code provision authorizing the joinder of causes of action arising out of "transactions connected with the same subject of action," speaks of this language as being "well chosen for the purpose intended, because it is so obscure and so general as to justify the interpretations which shall be found most convenient and best calculated to promote the ends of justice."

And in Wiles vs. Suydam, 64 N. Y., 178, speaking of the same code provision, it is said:

"There is certainly ample scope for construction; but it is sometimes difficult to determine what interpretation will best promote the ends of justice. It is probable that

the primary purpose of this provision was intended to apply to equitable actions, which frequently embrace many complicated acts and transactions relating to the subject-matter of the action, which it would be desirable to settle in a single controversy."

See also:

State vs. Torinus, 28 Minn., 175; 9 N. W., 725.

We are thus amply justified in the assertion that the subject-matter of the original bill is the property involved in the litigation; to-wit, the waterworks plant, the street rights and the contract rights relating thereto. The object of the original bill is the protection and enforcement of these property and contract rights. The matters alleged in the cross-bill are directly connected with the same subject-matter; therefore the cross-bill is maintainable. The doctrine is illustrated by numerous cases:

In Morgan's Company vs. Texas Central, 137 U. S., 171, the complainant, being the owner of certain obligations of the defendant railroad company, filed its bill for the purpose of procuring the appointment of a receiver, and a decree for the payment and satisfaction of its claims out of the rents, revenues, issues and profits coming to the receivers. Among other defendants was a trust company, which was trustee in a deed of trust upon the property of the railroad company, given to secure an issue of bonds. This trustee filed its cross-bill, seeking the foreclosure of the mortgage. It will be observed that the mortgage sought to be foreclosed was in no manner connected with the

obligations held by the original complainant, and the matters averred in the cross-bill had no connection with those alleged in the original bill, except that the property of the railroad company, from the rents, issues and profits of which the complainant sought to have its obligations discharged, was the same property covered by the mortgage which the cross-complainant sought to have foreclosed. This property was considered to be the subject-matter of the action, and for that reason it was held that the cross-bill was properly filed and could be maintained, the court saying (p. 201):

> "It seems to us that in order that a decree might be made upon the whole matter in dispute, brought completely before the court, the bill in question was necessary and was correctly styled a cross-bill. In no proper sense were new and distinct matters introduced by it, which were not embraced in the original and amended and supplemental bills, and while it sought equitable relief, it was such as, in point of jurisdiction over the subject-matter, the court was competent to administer. It may be that, so far as it sought the further aid of the court beyond the purposes of defense to the original bill, it was not a pure cross-bill, but that is immaterial. The subject-matter was the same, although the complainant in the cross-bill asserted rights to the property different from those allowed to it in the original bill, and claimed an affirmative decree upon those rights. A complete determination of the matters already in litigation could not

> have been obtained except through a cross-bill, and different relief from that prayed in the original bill would necessarily be sought. * * * And whether this bill be regarded as a pure cross-bill, as an original bill in the nature of a cross-bill, or as an original bill, there is no error calling for the disturbance of the decree because the court proceeded upon it in connection with the other pleadings."

In Kingsbury vs. Buckner, 134 U. S., 650, the court was considering a case where the complainant, by his bill, claimed to own certain real estate by inheritance from his father, to whom the defendants had conveyed it by deed, absolute in form, and prayed for a decree confirming and establishing his title. The defendants by cross-bill alleged that the deed was made and accepted for the purpose of placing the title in trust for the benefit of one of the defendants, and asked a decree to that effect. It was held that the subject-matter of the cross-bill was germane to that of the original bill, the court saying (p. 676):

> "But it is said that the subject-matter of the original bill was simply the claim alleged to be asserted, in hostility to the plaintiff, under the will of his father, and that Mrs. Buckner's claim that the property conveyed by the deed of May 15, 1861, was held in trust for her, could not properly be made the subject of a cross-suit. * * * This view cannot be sustained, for it is clear that the matter in respect to which the plaintiffs

in the cross-bill sought relief was embraced by the original bill. The original bill asserted ownership by appellant, subject to certain incumbrances and rights of dower, of the entire real estate standing in his father's name at the time of his death, including that which Buckner and wife conveyed by the deed of May 15, 1861. It made distinct reference to that deed as the source of his father's title to the property here in question, and, therefore, as the foundation of his own claim; and the relief asked was not restricted to a decree simply declaring the alleged will of 1862 to be invalid. But a decree was sought by which his right and title to the property claimed to be held in trust for Mrs. Buckner by her brother should be confirmed and established, and all the defendants, including her, perpetually enjoined from intermeddling with it, or with its rents, issues or profits. The subject-matter of the original bill, so far as she was concerned, was the title and ownership of the property conveyed by the deed of May 15, 1861. The plaintiff claimed title under that deed, and by inheritance from his father. Mrs. Buckner claimed it under the same deed, but she averred that it was a trust deed. The allegations of the cross-bill related to that property, and, in answer to the plaintiff's demand that his title to it be confirmed, she demanded that the trust created by the deed of 1861 be declared, and her ownership established as against the plain-

> tiff. It is true that the cross-bill alleged additional facts, but its subject-matter was not the less, for that reason, germane to that of the original bill.
>
> * * * * * *
>
> So, in the case before us, while Mrs. Buckner might, perhaps have, defeated the plaintiff's suit by proving, under her answer, the facts set out in the cross-bill, it was competent for her in the same suit, to obtain such affirmative relief as was appropriate under proof that her brother did not become the absolute owner of the property by the conveyance of 1861, but was invested with the title in trust for her."

It is the settled policy and the boast of equity that through its process and by its remedies a multiplicity of suits is prevented, complicated litigation entertained and concluded in one proceeding, and all of the rights of all of the parties, touching every controversy arising out of a single subject-matter, completely adjudicated in the one suit. This settled policy would be disregarded, and the rule so announced violated, if a defendant were forced under such circumstances to bring a separate suit for the purpose of obtaining affirmative relief upon the facts alleged by him as a defense to the original action.

But in the present case it is manifest that the court cannot proceed to a decree upon the original bill without settling the rights of the Water Company, presented by its cross-bill. A decree for the sale of the property to the City could not be made

without destroying the right of the Water Company to continue to use said property in the business of water supply. A decree for the determination of the value of the property to be sold could not be made without ascertaining the constituent elements of that property, including the duration of street rights and contract rights. A decree properly protecting the rights of all parties in the subject-matter could not be made without determining the nature and extent of such rights. The authorities are legion in which a cross-bill has been entertained for affirmative relief, based upon facts which, in themselves, constituted a perfect defense to the original claim of the complainant.

As was said by Judge Sanborn, in Springfield vs. Barnard Company, 81 Fed., 261, 263, one of the offices of a cross-bill is

> "* * * to obtain full relief to all parties, and a complete determination of all controversies which arise out of the matters charged in the original bill."

To the same effect:

Ex Parte Railroad Company, 95 U. S., 221, 225.

Meissner vs. Buek, 28 Fed., 263.

First National Bank vs. Salem Co., 31 Fed., 580.

North British Ins. Co. vs. Lathrop (C. C. A., 4th Cir.), 70 Fed., 429, 431, 433.

Blythe vs. Hinckley, 84 Fed., 228, 234.

Peacock Company vs. Thaggard, 128 Fed., 1005, 1007.

Royal Union Ins. Co. vs. Wynn, 177 Fed., 289, 292, 293, 294.

Crisman vs. Heiderer, 5 Colo., 589, 593.

Hurd vs. Case, 32 Ill., 45, 49.

Davis vs. American Christian Union, 100 Ill., 313, 317.

Dawson vs. Vickery, 150 Ill., 398; 37 N. E., 910, 911.

Ashe Carson Co. vs. Bonifay, 147 Ala., 376; 41 So., 816.

Union Street Ry. Co. vs. City, 115 Mich., 300; 73 N. W., 243, 245.

Haberman vs. Kaufer, 60 N. J. Eq., 271; 47 Atl., 48.

Mallory vs. Globe Boston Copper Co., 11 Ariz., 296; 94 Pac., 1116.

In Farmers Loan & Trust Company vs. City of Sioux Falls, 131 Fed., 890, the case was heard at circuit before their honors, Judges Sanborn and Carland. A bill had been filed by the trust company as trustee in a deed of trust given by the water company to secure its bond issue, the purpose of the bill being to restrain the city of Sioux Falls from proceeding to construct and establish a system of waterworks, for the reason that the construction and operation of such a system would impair, if not wholly destroy, the revenues which were being earned by the water company in furnishing the city and its inhabitants with water, in pursuance of a certain contract. The defendant water company filed a cross-bill, seeking a like injunction against the city, upon the ground that the city was proceeding without authority of the

statute, and in violation of the Constitution; that, therefore, the acts and threatened acts of the city were illegal and wrongful; and since they would inflict serious damage upon the water company and its property, an injunction should be issued. The water company asserted in its cross-bill that it was a taxpayer in the community to a very large amount, and that its property would be burdened by the wrongful and illegal tax which the city proposed to levy for the purpose of constructing the municipal waterworks system. This cross-bill was objected to upon the ground that it was not germane to the matters set forth in the original bill; but the court said (p. 902):

> "It is contended that the right of the complainant and the Water Company to restrain the City from constructing its works and taxing the property of the complainant and the Water Company, upon the ground that the City has proceeded without authority of the statute and in violation of the Constitution, may not be litigated in this case, because it is not a cause of action of the complainant, but one brought into the case by the cross-bill of the Water Company, separate from and not germane to the issues presented by the original bill and answer.
>
> A cross-bill which presents a matter that is not a subject of litigation between the complainant and the defendants, or between the defendant who presents the cross-bill and the complainant, and which does not aid in the determination of any of the issues presented in the original suit, is demurrable and

> must be dismissed. But the right here asserted is the right to relief against irreparable damage to the property of the complainant and the property of the Water Company alike, arising from the alleged illegal construction of the City water works, and the alleged illegal taxation of the property of both complainant and the Water Company."

Accordingly, the objection to the cross-bill was overruled.

The determination of the question as to whether or not a cross-bill is germane is governed by the same rules which obtain in considering whether various matters alleged in an original bill render it multifarious.

> 2 Street's Federal Equity Practice, sec. 1031.
>
> Gibson on Suits in Chancery (2nd Ed.), sec. 737.

The question as to whether the objection of multifariousness will be sustained is, as this court has frequently declared, "very largely a matter of convenience."

> United States vs. Bell Telephone Co., 128 U. S., 315, 352.
>
> Graves vs. Ashburn, 215 U. S., 331, 355.

The Circuit Court of Appeals for the Eighth Circuit has said:

> "The vice of multifariousness is the union of causes of action which, or of parties whose claims, it is either impractical or in-

convenient to hear and adjudicate in a single suit. Where this vice does not exist; where it is as practical and convenient for the court and the parties to deal with the claims or causes of action presented and the parties joined in a petition in one suit as in many, the pleading is not multifarious and it should be sustained."

Westinghouse Air Brake Co. vs. Kansas City Co., 127 Fed., 26, 31.

To the same effect:

United States vs. Allen, 179 Fed., 13, 22.

Kelly vs. Boettcher, 85 Fed., 55, 64.

Jones vs. Missouri Edison Electric Co., 144 Fed., 765, 780.

Rogers vs. Penobscot Co., 154 Fed., 606.

It follows that the objection that a cross-bill is not germane, like the objection of multifariousness, is one addressed to the judicial discretion of the court, and one which will not be sustained, if the convenience of the court will be subserved and additional litigation avoided by ruling against it. Since the court below has entertained this cross-bill, that exercise of discretion will not be disturbed on appeal.

As is said in Street's Federal Equity Practice, Volume 2, page 630, section 1038:

"After a suit has been adjudicated in the court below on an original bill and purported cross-bill, the Supreme Court will not reverse where the only objection to the proceedings is that the purported cross-bill was

> not a pure cross-bill. A proper decree on the merits having been entered, it is a matter of indifference whether the purported cross-bill be regarded as a pure cross-bill, as an original bill in the nature of a cross-bill, or as an original bill."

There is another view to be taken of the matter. Under the broad powers conferred by the statutes of the United States, a court of equity may, whenever it appears reasonable so to do, consolidate causes of a like nature, or relative to the same question.

> Revised Statutes, sec 921.
>
> Compiled Statutes, 1901, p. 685.
>
> Rose's Code, Vol. 1, sec. 823.
>
> Lant vs. Kinne (C. C. A., 6th Cir.), 75 Fed., 636.

If the Water Company had filed an independent suit in equity, setting up the matters embraced in its cross-bill, and seeking the relief there sought, it would have been reasonable, under the authority of the foregoing statute, for the court below to have consolidated that cause with the suit of the Trust Company already pending, relating to the same subject-matter and calling for the construction of the same municipal contracts; and if the present objection to the cross-bill were sustained, and the cross-complainant forced to file an independent bill for the same relief, there is every reason to believe that the court would make such order of consolidation, and it would be a reasonable, proper and commendable exercise of its discretion so to do. If such an order were made, would this

court reverse a decree for that reason? And if not, will this court sustain the present objection, when the only result will be to force the cross-complainant to file an independent bill, thereafter to be consolidated with the present proceeding, and the exact situation now presented to the court again arrived at by a circuitous route?

It is proper to add that the objection of non-germaneness, like that of multifariousness, is one which may be waived, and which is waived by answering over, or by the failure to present it in due form and at the proper time. Upon the present record this court cannot entertain it.

At the time of the hearing upon application for temporary injunction herein the defendants had filed no pleadings whatever, either to the original bill or to the cross-bill; nor, so far as this record shows, have they ever done so. The objection of multifariousness or of non-germaneness must be raised by demurrer. Until so raised it ought not to be considered. We submit that appellants' contention to the effect that the cross-bill is improper because not germane cannot be sustained.

Bearing in mind the rules firmly settled by the foregoing decisions, the cases cited by appellants are readily distinguishable.

Stuart vs. Hayden, 72 Fed., 402, was a case in which the cross-bill presented a controversy between co-defendants, wholly disconnected with the subject-matter of the original bill. The subject-matter of the original bill was the stockholder's liability of Stuart upon certain bank stock. The subject-matter of the cross-bill was a claim by certain parties defendant

against the defendant Stuart for the restitution of moneys which they had at one time paid him as part of the purchase price for said stock. It is difficult to conceive upon what theory learned counsel regard this case as analogous to the one at bar. If there be general language in the opinion which seems to them to lend color to their contention, it can have no effect, in view of the later decision of the same court in Springfield Company vs. Barnard Company, 81 Fed., 261, dealing with the same subject, and containing a clear exposition by Judge Sanborn of the office and propriety of a cross-bill.

Ayers vs. Chicago, 101 U. S., 184, involved a bill filed by the city of Chicago to enforce a certain trust in real estate, created by a deed. A defendant, who had been made such upon his own petition, filed a cross-bill in the nature of a creditor's bill, to subject the trust property to the payment of a subsequent judgment which he had obtained against the grantor in the deed and creator of the trust. The Supreme Court evidently considered this cross-bill a proper one.

In Cross vs. De Valle, 1 Wall., 5, the court was considering the question whether the dismissal of the original bill carried with it also the cross-bill. The Circuit Court had dismissed both the bill and the cross-bill. Federal jurisdiction existed, if at all, only by reason of diversity of citizenship in the original bill. The court affirmed the orders of dismissal, but plainly indicated that the dismissal of the cross-bill would have been improper if it could have been retained as an original bill, having the necessary averments to give federal jurisdiction. At page 14 the court says:

> "As an original bill the court might properly refuse to consider it. First, on account of the parties, and secondly, on account of the subject-matter.
>
> The bill is filed in Rhode Island. All the complainants are citizens of states other than Rhode Island or Louisiana, while one of the defendants, Cross, is a citizen of the state last named, and not commorant in Rhode Island. It was admitted that this objection was conclusive, if the bill was an original. The second objection is equally conclusive, whether it be called a cross-bill or an original. A chancellor will not maintain a bill merely to declare future rights."

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3. *Alleged Non-Performance of the Provisions of Ordinance 44 of 1890 by the Water Company.*

On pages 180-187 of the City's brief, arguments are made under two headings—that there has been a non-performance on the part of the Water Company of the provisions of Ordinance 44 of 1890, and that it is estopped to assert the right of contract renewal because of its conduct subsequent to the appraisement under Ordinance 163 of 1907.

These same contentions were set forth in the City's brief in the Circuit Court of Appeals, at pages 194-201, but under one heading, as follows: "Water Company Estopped from Asking Specific Performance." For convenience' sake, we will follow the form pursued by counsel for the City before this court. The non-performance complained of consists

in two things: (1) the effect of the decision in the case of City of Denver vs. Denver Union Water Company, 41 Colo., 77; and (2) the failure of the Water Company to set certain hydrants.

It is not easy to ascertain the exact pertinency of the citation of the case of Denver vs. Water Company, 41 Colo., 77, but as it has been several times referred to in the City's brief, and erroneously exploited and applied (City's Brief, pp. 122-131, 180-183), it may be well at this place to thoroughly understand the nature of this decision. In the first place, it was a proceeding between the City and the Water Company, and it is unnecessary to say that it constitutes *res adjudicata* of all the matters which were involved and there decided. It is unnecessary for the City to stop short of a claim of *res adjudicata*, or to attempt to set up the weaker defense of estoppel. Whatever form the reference to this case takes at various places in the City's brief, it is predicated upon the assertion that by such decision section 5 of Ordinance 44 was declared to be unenforceable, and therefore the entire Ordinance 44 of 1890 was either *ipso facto* void, or incapable of a renewal according to its terms, and as contended for by the Water Company. No doubt this court will satisfy itself as to the character and extent of this case by a reading thereof, but it may be helpful to point out in a brief way the matters at issue in that case, and the extent of the decision. The case was brought by the City of Denver against the Water Company for several alleged breaches of Ordinance 44 of 1890, particularly three: (1) Section 5 of Ordinance 44 of 1890 had been violated and improper rates had been

charged; (2) section 6 of Ordinance 44 of 1890 had been violated in that the water was not of the contract quality and purity; (3) section 8 of Ordinance 44 of 1890 had been violated in that the contract pressure had not been maintained.

It will be noticed that the suit was instituted by the City and maintained on the theory of the validity and effectiveness, not the invalidity, of Ordinance 44 of 1890, and the prayer was for its enforcement, not a declaration that it was invalid. The trial court found the issues in favor of the Water Company as to purity and pressure, and upon the evidence undertook to establish a schedule of rates in accordance with the court's view of the proviso of section 5 of Ordinance 44 of 1890. Section 5 of Ordinance 44 of 1890 is as follows:

> "The rate to private consumers for water shall not be greater than now charged by the said The Denver Water Company, a schedule of which rates is hereto attached marked 'Schedule A,' and the said The Denver Water Company may require any consumer to furnish a meter and pay for water by meter measurement; *Provided, However, that at any time after five years from date, the City Council may require said company to fix a schedule of rate for private consumers equivalent to the average rate prevailing in the cities of Chicago, St. Louis, and Cincinnati, for the same service.*"

Schedule A referred to in section 5 consisted of 109 items, with the particular charge or rate opposite

each item, and was in effect for the first five years after the adoption of Ordinance 44 of 1890. The controversy arose when at the expiration of these five years the City requested that the proviso of section 5 be put in effect, and that an equivalent to the average rate prevailing in Chicago, St. Louis, and Cincinnati be substituted for Schedule A. The result was confusion. The Water Company attempted to fix such an average rate; the City was dissatisfied, and this prompted the litigation. The trial court tried its hand at fixing the average rate of these three cities, and the result was a schedule of rates even higher than that which the Water Company itself had offered as the result of its effort to fix such average rates. There was nothing ambiguous, indefinite or unenforceable in any way in the main portion of section 5, which includes Schedule A. It was the proviso which gave the trouble to the Water Company, the City and the court. It may be noticed that in this section 5 there was no time limit placed on the effectiveness of Schedule A, but that by the proviso the privilege was given to the City of calling for the average rate of three other cities. It follows, therefore, that if this proviso is ambiguous or unenforceable, the main sections of section 5, including Schedule A, have always been and are today legally in force under the terms of Ordinance 44 of 1890, as the rates permitted to be charged by the Water Company for service to private consumers, except as the Water Company has voluntarily reduced the same, which it has several times done. This is exactly what the Supreme Court of the State of Colorado determined in the decision in 41 Colorado: First, that court found the issues in favor of the Water Company, and affirmed the judg-

ment of the lower court that the quality, purity and pressure of the water and water service fully complied with the requirements of Ordinance 44 of 1890. It then found that the *proviso* of section 5 concerning the average rate of three cities was unenforceable, because the methods of fixing rates in the three cities was different, and it was impossible to make either a mathematical or a practical average. In other words, the schedules of these three cities could not be reduced to a common denominator.

The Supreme Court did, however, uphold that portion of the rates concerning irrigation and meter service, and it did expressly uphold other provisions of Ordinance 44 of 1890, including the reasonableness of the rules of service promulgated by the Water Company. This decision upheld—it did not invalidate—Ordinance 44 of 1890.

But, aside from the reading of this decision itself, the principle for which counsel for the City contend is unsound. Assuming, *arguendo*, that section 5 had been declared unenforceable—not only the proviso, but the main portion, including Schedule A—it does not follow by any means that Ordinance 44 of 1890 as an entirety is void. Section 5 might be eliminated by adjudication, just as it might have been eliminated at the time Ordinance 44 was drawn and passed. Can it be claimed that, if section 5, or any other provision, attempting to fix the rates which the Water Company could charge to private consumers, was omitted, an entire ordinance of this character was invalid? We think it may be safely stated that the majority of ordinances of this kind contain no schedule of rates to be charged to private consumers. In such cases the authorities are unanimous in hold-

ing that the right to control rates, being the exercise of a governmental or police power, is retained by the municipality, and that it may from time to time fix such rates, when this power has not been suspended in the hands of a public utility by express contract and for a limited period, subject only to the limitation that the rates so fixed by the municipality must not amount to confiscation or the taking of property without due process of law. Public utilities of all kinds—gas, light, telephone and street railroad companies—accept grants and privileges from municipalities with no provision whatever as to the charge to be made for the commodity. To illustrate in the case at hand: Eliminating section 5 in its entirety, either by adjudication or from the first draft of Ordinance 44 of 1890, and the Water Company would still have the other privileges and contracts conferred by Ordinance 44 of 1890, subject to the exercise of governmental power on the part of the City of Denver of fixing reasonable rates which would not amount to a confiscation of the property of the Water Company.

As to the charge that the Water Company has failed in compliance with section 13 of Ordinance 44 of 1890, and the ordinances passed thereunder, to set and install hydrants, let us consider, in the first place, the condition of the record. The Water Company in its cross-bill has most positively several times asserted full compliance with the terms of Ordinance 44 of 1890, which, of course, includes the setting of hydrants. (Tr. Rec., p. 121, fol. 231; p. 138, fol. 264; pp. 140-141, fol. 269.) These averments are, of course, undenied, but at the hearing an affidavit, with certain certificates attached, was used by the City The affi-

davit is that of E. B. Thrush, found with the exhibits attached at Transcript of Record, pages 261-265. It is perhaps worth the labor to examine this affidavit. After stating the employment and duties of Thrush, it sets forth a list of permits supposed to have been issued to the Water Company for excavations during a certain period of time; although the completeness of this list is discredited in the affidavit itself upon the ground of lack of time to obtain information. The affidavit of Thrush has attached thereto, as Exhibits A, B and C, three certificates of the city clerk purporting to set forth the ordinances providing for the extension of mains and the setting of hydrants since 1902. An examination of these three exhibits shows that only thirty-three hydrants are therein called for, and we cannot understand the statement at page 182 of the City's brief that these three exhibits required the setting of 158 hydrants. By referring to the permits set forth in this same Thrush affidavit, we find that all hydrants required to be set on Exhibit A under Ordinance 22 of 1907, 60 of 1907 and 93 of 1907, have been in fact set, leaving only one hydrant under Ordinance 95 of 1907 unaccounted for; and on Exhibit C the hydrants referred to in Ordinances 83 and 84 of 1909 have likewise been set. The result is that by this very affidavit and exhibits the disclosure is made that eleven out of thirty-three hydrants have been set, leaving twenty-two hydrants alleged not to have been set during a period of twenty years. But in this connection we call the court's attention to the provisions of section 13 of Ordinance 44 of 1890, and particularly to the fact that a condition was imposed upon the City before it could order the setting of hydrants. No ex-

tension could be ordered—or, if ordered, it was of no binding effect—unless a fire hydrant was ordered for every four hundred feet of extension at least, or fractional part thereof (Tr. Rec., p. 37, fol. 69.) Neither the Thrush affidavit nor the certificates of the city clerk state or show that the extensions of mains and the settings of hydrants called for by the various ordinances were in accordance with this express term of section 13 of Ordinance 44 of 1890. As the Water Company had averred a complete performance of the conditions of Ordinance 44 of 1890, it was the duty of the City, if it challenged this statement by an affidavit, to cover the matter completely, and to have shown that, when the setting of hydrants was called for by ordinances, this was in accordance with the provisions of Ordinance 44 of 1890.

But this is not all. The Thrush affidavit discloses that many of the hydrants called for were not in the territory originally covered by Ordinance 44 of 1890. This fact is clearly shown in connection with the affidavit of Mr. Thomas, and the map attached thereto (Tr. Rec., pp. 233-236, fols. 388-392). Many municipalities which were afterwards incorporated into the City and County of Denver had separate franchises, ordinances and contracts from that of Ordinance 44 of 1890. The very first extension referred to in Exhibit A of the Thrush affidavit under Ordinance 51 for the year 1902, at West Thirty-ninth Avenue and Gallup Street, is just outside of the boundaries of the old City of Denver.

The only hydrant referred to in Exhibit A of the Thrush affidavit which appears from the record not to have been set is called for by Ordinance 95 of 1907.

This hydrant is located at the corner of Tennessee Avenue and South Clarkson Street—not in the territory covered by the old City of Denver and Ordinance 44 of 1890, but in the municipality of South Denver, where the Water Company is operating under Ordinance 54 of 1894. The same is true of hydrant located at South Cherokee Street and West Florida Avenue, appearing in Exhibit B. The hydrant called for by Ordinance 28 of 1908 is located at the corner of Detroit Street and Fourth Avenue, and is in the old municipality of Harman.

Sufficient of these cases have been singled out to show the court that it does not appear by the record that the extensions and hydrants referred to in the Thrush affidavit were within the territory of the old City of Denver or are covered by Ordinance 44 of 1890.

It will be remembered that section 13 of Ordinance 44 of 1890 only required that extensions should be made when hydrants were called for every four hundred feet, and in neither of the affidavits does it appear that this requirement of section 13 has been met in the cases where hydrants have not been constructed. But perhaps we have dwelt too long upon such a minor point, for a similar contention was raised in the case of the City of Omaha vs. The Omaha Water Company, 156 Fed., 922, and such contentions disposed of.

In the Omaha case objection was raised by the city against keeping its obligations and paying the hydrant rentals, because it was contended, among other things, that the water company had failed to install certain additional hydrants which had been ordered by the city. One hundred and seventeen new hydrants had been ordered within a certain period of

time, and only forty-nine installed, leaving sixty-eight unplaced. The general provisions of the Omaha and Denver contracts are quite similar in respect to the installation of new hydrants.

This court thus disposed of the contention in the Omaha case:

> "The contract prescribed no time within which new hydrants should be installed on new mains after being ordered by the City, and the Company was therefore entitled to a reasonable time for performance of its duty in that particular. Whether the company committed a breach of its contract by failing to install all of the hydrants involves a consideration of the number ordered, and what would be a reasonable time in view of the season of the year. There were 117 ordered between July 12 and December 20, 1904. Of these the company installed 49, and to do so laid about four miles of new mains before January 1, 1905. We find no evidence that this was not a reasonable performance by the company of its duty. It cannot be assumed that the company broke its contract merely because on January 1, 1905, 68 of the hydrants ordered during the preceding six months had not yet been placed. * * *
>
> One party to a continuing contract of mutual and dependent covenants cannot require the other to perform executory stipulations while he persists in defaults and compels the other to seek the aid of the courts

> for compensation due for those he has already executed."

Previously in this same opinion, however, the court has stated the general rule of law which we hold shall be controlling:

> "It is well settled that substantial performance of a contract by one party coupled with retention of the benefits thereof by the other will authorize an action by the former to recover the contract compensation; that in such case recovery may be had upon an averment of full performance, though the proof falls short of showing it; and that the remedy of the latter is by counter-claim for his damages or by an independent action before he is sued."

If during a period of twenty years, during the most of which time this record discloses that the City was engaged in harassing the Water Company, the only supposed dereliction attributable to the Water Company can be the failure to set some twenty hydrants, and even this supposed dereliction not being shown to be contrary to the provisions of Ordinance 44 of 1890, we believe there is no merit in the contention that the Water Company is debarred from the enforcement of its substantial rights under Ordinance 44 of 1890.

4. Alleged Estoppel against the Water Company.

The City contends (Brief, pp. 183-187) that the Water Company is estopped to assert its rights under Ordinance 44 of 1890, because (1) prior to April 10, 1910, the Water Company prepared and submitted to the people an entirely new franchise; (2) in support and explanation of this presentation of a new franchise to the electors it issued a circular and statement.

The doctrine of estoppel is both effective and wholesome. Its application is controlled by principles now so well adjudicated as to be beyond dispute. If the defense of an estoppel is earnestly relied upon by the City, it is to be expected that counsel would at least have discussed the general principles of estoppel and sought to apply any facts appearing in the record which seemed pertinent to such a discussion.

It is not our purpose to encumber this brief by any lengthy dissertation on what constitutes the essentials of an estoppel, but on that subject we refer to authorities which plainly set them forth:

Ewart on Estoppel, pp. 10, 11.

Herman on Estoppel, Vol. I, sec. 7.

Bigelow on Estoppel (4th Ed.), pp. 445-448.

The rule is, unless the elements of an estoppel appear in the bill itself and can be reached by demurrer, they must be pleaded in order to be available.

Pennsylvania Co. vs. Cole, 132 Fed., 668.

Maybury vs. Louisville, J. Ferry Co., 60 Fed., 645, at 656.

Bates on Federal Equity Procedure, paragraph 310.

We have no desire, however, to insist upon a technical matter of pleading in the examination of this controversy from the standpoint of an estoppel.

Where an equitable estoppel is relied upon, the facts constituting it must be proven, and not left to intendment and conjecture.

Standard Sanitary Mfg. Co. vs. Arrott, 135 Fed., 750.

Every single element necessary to constitute an estoppel *in pais* is lacking under this record. There has not been a misrepresentation of fact on the part of the Water Company, either by declaration or by omission, to speak where duty required. The City has not acted upon any such alleged act or fact, and it has not been damaged thereby.

With a desire to adjust without litigation all pending differences with the City, the Water Company, in strict pursuance of the charter provisions of the City of Denver, and exercising a right which any person had, drafted and presented to the taxpaying electors of the City of Denver a new franchise. (Tr. Rec., pp. 268, 269; fols. 429-432.)

Section 20 of this franchise was as follows:

"Section 20. Neither this franchise or grant, nor any provision herein, nor the proposal thereof, shall be a waiver of any right, claim, grant, license, franchise or right of way belonging to or claimed to belong to The Denver Union Water Company, or any of its assignees, predecessors or consolidat-

ing companies; nor shall this franchise and grant in any manner be considered as a waiver in any way of any right or contention by either the City and County of Denver or The Denver Union Water Company, to the prejudice of either party as to the validity, scope, construction or duration of any franchise, grant, easement, license or right of way owned or claimed by the grantee, but the rights of both parties and their positions and contentions in any and all litigation existing or which may arise concerning ordinances, franchises, grants, licenses and rights of way owned by the grantee, and in respect of any claim or contention shall remain entirely unaffected by this ordinance, or the proposal thereof."

It was not adopted, and the City in no manner was misled or acted upon the presentation of this new franchise.

A disturbed condition had existed for many years in Denver concerning the rights of the City and the Water Company, with the result that not only the Water Company, but the City and its inhabitants, desired an early and effectual disposition of the controversy. With the hopes of bringing about such a conclusion, the Water Company presented to the taxpaying electors of the City and County of Denver this franchise of May 17, 1910, *entirely outside of and disconnected from Ordinance 44 of 1890,* and as it had a right to do under the charter provisions of the City. No language, it would seem, could be clearer than that of section 20, *supra,* in stating that

neither the proposed franchise nor its proposal should in any manner affect the rights or contentions either of the City or the Water Company; yet in the face of this language, and although such a franchise was not voted, counsel for the City are now contending that there was a waiver by the Water Company.

It is true that a few days prior to the election in May, 1910, the Water Company issued a supplementary circular urging the adoption of the new franchise containing the reservation of all rights as set forth in section 20 thereof. Some recitals from this circular are copied at pages 184, 185 and 186 of the City's brief, and we most earnestly and cordially invite a perusal of this entire circular. Comparison was made between two franchises—one of them was older than the other and was denominated "The Old Franchise." How the use of such language can constitute an estoppel has not been demonstrated to us, and certainly the City in no manner acted to its disadvantage because of the fact that the proposed franchise was referred to as "A New Franchise."

The circular which was issued by the Company in explanation of this proposed franchise and its terms, and containing a comparison with those of Ordinance 44 of 1890, appears in the record (Tr. Rec., p. 283, fols. 448-450), but this court will search this address or pamphlet in vain for a single word that indicates a purpose on the part of the Water Company to have abandoned or waived any rights in Ordinance 44 of 1890, or intimating that the Water Company took any different position in regard to its rights under Ordinance 44 of 1890 from what it now presents in its cross-bill in this suit.

Was this circular a representation of fact? Did it mislead the City? Did the City act upon it to its detriment? The record discloses no affirmative answer to these questions, and the claim of estoppel must expire of its own weakness.

Some seeming contention is made under this heading of estoppel that silence on the part of the Water Company between the adoption of section 264A in May of 1910, and the institution of this litigation August 22, 1910, debars it from relief. The ordinance calling for a special election under section 264A—being Ordinance 98 of Series of 1910 (Tr. Rec., pp. 82-85)—was not passed until July 6, 1910, and in a little more than a month thereafter litigation was begun to protect the rights and property of the parties under Ordinance 44 of 1890. Did this silence and inaction constitute a misrepresentation on the part of the Water Company? Did the City rely upon it? The argument of counsel for the City is as mute in answering these questions as the record itself.

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5. The City Has No Power to Acquire Simultaneously Two Complete and Independent Water Systems.

Has the City the power to acquire simultaneously two complete and satisfactory water plants for supplying itself and its inhabitants with water?

The City seems to maintain that, although the contention of the Trust Company should be upheld to the effect that under Ordinance 44 of 1890, or 163 of 1907, or 264A itself, the City had purchased or was compelled to purchase the plant of the Water Company (which it is conceded was complete and effici-

ent), nevertheless the City had the additional right or power to proceed at the same time to construct an entirely independent and complete water plant, duplicating in extent and efficiency the one already purchased. The conclusion which follows this, of course, is that the action of the City in constructing a second independent plant cannot be interfered with and that the most which the Trust Company or the Water Company could have would be an action for a breach of the contract to purchase.

The consideration has not gone far enough.

The power of the City to supply itself with water is delegated to it by the state, and such power must be as strictly construed as is the grant from a municipality to a public utility. Certainly, there is nowhere in either Article XX of the Constitution or the charter of the City the express power to simultaneously acquire *two complete water systems*, and we have heard no arguments advanced why there is a necessary implication that it may do so. It has the power to acquire one complete plant, and it may do this by purchasing a portion of the plant and constructing another portion of the plant, or adding to the whole or any part for the purpose of increasing the efficiency or making the whole satisfactory. But once the City has by either purchase or construction, or a combination of both, acquired a complete and efficient water system, it has exhausted the municipal power on this subject. It resolves itself entirely into a question of municipal power, and we submit that the City, neither by express provisions of its charter nor by necessary implication, has the right to acquire *simultaneously two independent and complete water systems*, and that any party having the requisite inter-

est, and who would be injuriously affected by this attempt to exercise a power which does not exist, could enjoin the attempt to acquire the second complete water system.

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6. Certain Contentions of Petitioners Relative to Section 264A.

(a) That said section operates prospectively only, and, therefore, could not impair the obligation of contract.

This contention is brought forward at page 141, and perhaps at other places in petitioners' brief. It is negatived by the language of section 264A, which applies expressly to ordinances and contracts in existence at the date of its adoption. (Record, p. 168, fol. 322.) If, therefore, there was a contract in existence on May 17, 1910, as the Water Company claims, then section 264A was, by its terms, made directly applicable thereto.

The cases cited at page 141 of petitioners' brief are not in point. One of them—to-wit, City Ry. Co. vs. Citizens Street Ry. Co., 166 U. S., 557—distinctly supports many of the contentions here made by the Water Company, and has been previously cited in this brief.

(b) That the City's breach of contract was complete upon April 10, 1910, and, therefore, subsequent legislation is to be disregarded.

This assertion appears at page 151 of petitioners' brief. It assumes that all contract relations between

the parties ceased upon the date mentioned, and that thereafter nothing remained except a cause of action for breach of contract.

In making such contention, the petitioners utterly ignore the contention of the Water Company that the contract in effect subsequent to April 10, 1910, was a renewal, or rather a continuance, of the service contract and the contract relative to supply to private individuals, evidenced by the terms of Ordinance 44, and that such contract was impaired by section 264A.

(c) That the City was, by legislation antedating Ordinance 44, Series of 1890, authorized "to construct or purchase waterworks for the use of the City," and that, therefore, the exercise of that power subsequent to the enactment of said ordinance cannot be regarded as an impairment.

This contention appears at page 153 of petitioners' brief. It ignores the settled rule that the City might, by valid contract, postpone the exercise of such a power.

But it is further vicious, in that the City in this argument again proceeds upon the false assumption, hereinbefore many times pointed out—namely, the assumption that the only contract which can be impaired is a contract giving the Water Company an exclusive right, and that the only tenable claim of impairment is one based upon a contract containing such a stipulation. This fallacious and misleading assertion, concerning the Water Company's position,

has, we think, been fully refuted by our previous discussion.

The authority cited at page 153 of petitioners' brief—to-wit, Shawnee Sew. & Dr. Co. vs. Stearns, 220 U. S., 462—does not in any manner sustain petitioners' contention. In that case there was no legislation whatever subsequent to the making of the contract, and the decision was that a contract could not be impaired, in the constitutional sense, by a statute existing at the time it was entered into.

IV.

PETITIONERS' CONTENTION THAT THE CROSS-BILL MUST FAIL FOR LACK OF FEDERAL JURISDICTION.

Stated succinctly, petitioners' argument seems to be:

1. Federal jurisdiction must fail as to the original bill because (a) diversity of citizenship has been produced by collusion, and when the parties are properly aligned, no such diversity exists; (b) the original bill does not properly present any federal question.

2. Jurisdiction of the cross-bill is dependent upon jurisdiction of the original bill, and if the original bill fails, the cross-bill must go, notwithstanding any independent ground of federal jurisdiction which it may present.

3. The cross-bill presents no independent ground of federal jurisdiction.

We shall not, in this argument, discuss the federal questions presented by the original bill. Doubt-

less that matter will have been fully covered by the argument on behalf of the original complainant. For the same reason we shall consider but briefly petitioners' argument relative to diversity of citizenship and collusion, for these matters also relate primarily to the original bill; but as the charge of collusion includes the Water Company, we cannot leave it unnoticed.

As a premise to this branch of our discussion, we call attention to the fact that the petitioners have not by plea, answer or otherwise than by suggestion and innuendo raised the point of lack of federal jurisdiction. In view of the fact that upon the face of the original bill diversity of citizenship between the parties as there arranged exists without question, and in view of the further fact that upon the face of said original bill, and the answer of the Water Company thereto, the complainant and the defendant Water Company undoubtedly occupy antagonistic positions, the consideration above mentioned ought to be a sufficient answer to this contention of the appellants.

In *Hartog vs. Memory*, 116 U. S., 588, 590, this court said:

> "The parties cannot call on the court to go behind the averments of citizenship in the record, except by a plea to the jurisdiction or some other appropriate form of proceeding."

To the same effect:

> National Masonic Assn. vs. Sparks, 83 Fed., 225.

Gaddie vs. Mann, 147 Fed., 955, 956.
Bates Federal Equity Procedure, sec. 252.

In *Wetmore vs. Rymer*, 169 U. S., 115, 128, this court said:

> "A suit cannot be properly dismissed by a circuit court as not substantially involving a controversy within its jurisdiction unless the facts when made to appear on the record create a legal certainty of the conclusion."

See also:

Howe vs. Howe and Owen Co., 154 Fed., 820, 822.
Hill vs. Walker, 167 Fed., 241, 243.

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1. Diversity of Citizenship.

Petitioners and appellants concede that if federal jurisdiction exists as to the original bill, the federal court likewise has jurisdiction to entertain the cross-bill, although the latter may present no independent ground for such jurisdiction. Necessarily, therefore, appellants' first effort is to destroy federal jurisdiction as to the original bill.

The complainant in the original bill is a New York corporation. All of the defendants are either Colorado corporations or citizens and residents of Colorado. Petitioners do not question that the original bill discloses a justiciable controversy between the complainant and all of the defendants, except The

Denver Union Water Company; but as to the latter defendant, petitioners insist: (1) that, as appears from the bill, the interests of the complainant and the Water Company are identical; there is no real controversy between them, and therefore complainant and defendant Water Company should be properly aligned upon the same side of the controversy, thus destroying diversity of citizenship; or (2) that if the original bill discloses an apparent controversy between the complainant and the defendant Water Company, such apparent controversy was one created by collusion, for the purpose of invoking federal jurisdiction, and therefore jurisdiction based upon diversity of citizenship must fail. But by paragraph Nineteenth of the original bill (Record, p. 25) it is averred that the Water Company and its officers assert that the waterworks system is reasonably worth more than the appraised value, and that the City, by reason, among other things, of its failure and refusal to consummate the purchase of the property at the appraised value or otherwise, has become obligated to the Water Company to continue the contract for a water supply for an additional period of twenty years, and that the Company and its officers are of the opinion and have determined that it is to the best interests of the Company and its stockholders not to bring or maintain any suit against the City for the purpose of enforcing any contract or election to purchase the property; but, on the contrary, to assert the right of the Company to a renewed contract for the additional period of twenty years; and that for these reasons the Company has failed and refused, and still fails and refuses, to institute or maintain, or to direct or authorize the South Platte Company, which it con-

trols, to institute or maintain, either alone or jointly with the complainant, any suit to compel the City and County of Denver to purchase said property, and that the defendant, the South Platte Company, for like reasons, has also refused to do so. The complainant further avers that if said contract of purchase be enforced, sufficient money will accrue to pay off all outstanding bonds, but that, unless it be so enforced, the value of the property which constitutes complainant's security will be greatly impaired, if not destroyed, and that it will be impossible for the Water Company to pay off said bonds, and that the market value of the bonds will be greatly impaired and diminished. And by paragraph Twentieth of the bill (Record, p. 26) it is averred that the defendants Water Company and the South Platte Company must join in any conveyance made to effectuate such purchase by the City, but that both of said companies are unwilling to join in such a conveyance, and will not do so unless directed and required so to do by competent legal authority.

The defendant Water Company, by paragraph Nineteenth of its answer (Record, p. 92), admits its attitude and the reasons therefor, as charged by paragraph Nineteenth of the bill; but denies that by reason thereof either the complainant or the bondholders will be injured or damaged, averring that such injury and damage has occurred and will occur by reason of the wrongful acts of the other defendants. And answering paragraph Twentieth of the original bill (Record, p. 92), the Water Company admits its refusal to join in a conveyance for the purpose of effectuating a purchase by the City, and avers that the City is obligated to continue and recognize a continuance of its con-

tract for a water supply; avers that such course will be to the best interests of all concerned, provided the City be required to recognize such continuance and right of continuance, and justifies its refusal to bring the suit and to join in the conveyance upon these grounds. And in the affirmative part of its answer the defendant Water Company, after setting forth the facts which justify the conclusion, avers (Record, p. 96):

> "That in its judgment and that of its directors and officers, said appraised value of $14,400,000 is less than the fair, reasonable and actual value of the property appraised at the instance of and to be purchased by the City and County of Denver; that the reasonable, fair and actual value of said property does and did largely exceed said appraised value, and that if the officers and directors of this defendant should fail to insist on said right of renewal which has accrued, instead of upon the completion of said purchase, this defendant and its officers and directors would violate the trust reposed in them by the stockholders of said company, and said stockholders, and each of them, would suffer great hardship and financial loss."

Moreover, one of the grounds upon which the complainant bases its claim that there has been an election by the City to purchase the plant, by which the City is now bound, is the so-called section 264A of the charter (Record, p. 21, paragraph Fifteenth). But section 264A, upon which complainant's case is in part rested,

is to the defendant Water Company an obstacle to be overcome; and so throughout its answer the invalidity of said section 264A is repeatedly asserted (Record, pp. 89, 90, 91, 96, 101, 102, 103, 104, 105, 106, 107, and the same matters are set forth at length in its cross-complaint.

The controversy between the Water Company and the complainant, the antagonism upon which that controversy is based, and the opposition of the Water Company to the object of complainant's suit, are so plainly apparent from these pleadings that no further comment is necessary .

An analogous case to the one here presented frequently arises when a non-resident stockholder brings a suit in a federal court, seeking to recover in the right of the corporation upon a cause of action existing in favor of the corporate entity, and basing his right to sue upon the refusal of the managing officers of the corporation to bring the action. In such cases the corporation is made a party defendant; and when federal jurisdiction is invoked upon the ground of diversity of citizenship, the suggestion is frequently made that the interests of the corporation are identical with those of the complaining stockholder, and therefore the two should be aligned together upon the record, so destroying diversity of citizenship. But the courts have uniformly held that where it appeared that the managing officers of the defendant corporation were opposed to the object of the suit, and so had refused to bring the action in the name of the corporation, such realignment could not be made by the court, and jurisdiction on the ground of diversity of citizenship was properly invoked.

Dodge vs. Woolsey, 18 How., 331, is the leading case. There the directors of a bank refused to take the proper measures to resist the collection of a tax, although they themselves believed it to have been imposed in violation of their charter. Thereupon a non-resident stockholder brought suit in a federal court, basing jurisdiction upon diversity of citizenship, which would not have existed had the bank brought the suit in its own name. It was alleged in the bill that the complainant had requested the directors of the bank to take measures, by suit or otherwise, to assert the invalidity of the tax, but that they had refused to do so. It was urged that this suit had been improperly brought in the Circuit Court of the United States, because it was a contrivance to create a jurisdiction where none fairly existed, by substituting an individual stockholder in place of the bank as complainant. Upon this point the court said (p. 346):

> "We first remark as to the imputation of contrivance, that it is the assertion of a fact which does not appear in the case, one which the defendants should have proved if they meant to rely upon it to abate or defeat the complainant's suit, and that, not having done so, as they might have attempted to do, we cannot presume its existence. Mr. Woolsey's right, as a citizen of the state of Connecticut, to sue citizens of the state of Ohio in the courts of the United States, for that state, cannot be questioned. The papers in the case also show, that the directors and himself occupy antagonist grounds in respect to the controversy which

> their refusal to sue forced him to take in defense of his rights as a shareholder in the bank. Nor can the counsel for the defendant assume the existence of such a fact in the argument of their case in this court, in the absence of any attempt on their part to prove it in the circuit court."

It is true that long after the decision in Dodge vs. Woolsey, the Ninety-fourth Rule in Equity was promulgated, setting forth certain conditions precedent necessary to be complied with before a stockholder's bill could be maintained. No such requirements exist in reference to a bill of the character here under consideration. But the requirements of Equity Rule Ninety-four do not and cannot diminish the jurisdiction of the Circuit Court, which is prescribed by laws enacted by Congress; and federal jurisdiction exists in respect of a bill brought by a non-resident shareholder, on the ground of diversity of citizenship, although failure to comply with Equity Rule Ninety-four may require its dismissal.

Venner vs. Great Northern Ry. Co., 209 U. S., 24.

In the case last cited it is said (p. 31):

> "Let it be assumed for the purpose of this decision that the court may disregard the arrangement of parties made by the pleader, and align them upon the side where their interest in and attitude to the controversy really places them, and then may determine the jurisdictional question in

view of this alignment. * * * If this rule should be applied it would leave the parties here where the pleader has arranged them. It would doubtless be for the financial interests of the defendant railroad that the plaintiff should prevail. But that is not enough. Both defendants unite, as sufficiently appears by the petition and other proceedings, in resisting the plaintiff's claim of illegality and fraud."

Citing:

Davenport vs. Dows, 18 Wall., 626.

Central Railroad Co. vs. Mills, 113 U. S., 249.

Railroad vs. Grayson, 119 U. S., 240.

Doctor vs. Harrington, 196 U. S., 579.

Groel vs. United Electric Co., 132 Fed., 252.

Chicago vs. Mills, 204 U. S., 321.

In Doctor vs. Harrington, *supra* (p. 587), the court says:

"The ultimate interest of the corporation made defendant may be the same as that of the stockholder made plaintiff, but the corporation may be under a control antagonistic to him, and made to act in a way detrimental to his rights. In other words, his interests, and the interests of the corporation, may be made subservient to some illegal purpose. If a controversy hence

arise, and the other conditions of jurisdiction exist, it can be litigated in a Federal court."

A case in point is Mercantile Trust Company vs. Texas and Pacific, 51 Fed., 529. There the trustees in certain railway mortgage had brought suit in equity against the railway companies and the state railroad commissioners to have declared invalid a statute of the State of Texas, and to avoid certain rates which the commission had established pursuant to said statute. No relief was prayed against the defendant railroad companies, nor did it appear that the companies asserted any position antagonistic to that assumed by the complainant. Nothing appeared except that the companies had failed to bring the suit. It was asserted by the state railroad commission that the suits were collusive, and therefore federal jurisdiction could not be conferred on the ground of diversity of citizenship; but the court said (p. 536):

"It is apparent from the whole record and the conduct of this hearing that the controversy is not between complainants and the railways, but between the railways and the other defendants. The bills of complainants and the answer and cross-bills of the railways, and the arguments of their counsel, show that there is no such element of collusion in these cases as can prejudice the rights of complainants to sue. The cases cited and pressed by counsel for defendants on this point are plainly different from the

cases here. The complainants here show equitable interest in the fair earnings of the roads; they show actual ownership and possession of the mortgage securities of the roads, both of which they allege are being irreparably injured and threatened with destruction by the defendants; they show that the railways are willing and want to meet all their obligations as mortgagors in possession, but that said railways are coerced by the defendants, armed with the railroad commission act, and the directors cannot exercise their judgment and discharge their duty as they should and would but for said coercion.

It may be that the railway companies could, under section 6 of the railroad commission law, or without the authority of that section, have brought these suits and obtained all the relief to which the complainants are entitled against the other defendants, or it may be that they could not. If they could not, that would only be one additional reason why the complainants should sue; and, if the railways could have so sued, that would be no reason for denying the complainants any right, even if, as seems to be hinted rather than charged, the railways could only have resorted to the state courts; and that there was a previous understanding between the complainants and the railways that the relief complainants desired and believed themselves entitled to receive would be more likely to be speedily and adequately

extended in the national courts. It was to meet such cases that the national courts were established. In them parties 'may hope to escape the local influences which sometimes disturb the even flow of justice.' Davis vs. Gray, 16 Wall., 221.

What has already been said expresses sufficiently my view as to the suggestion, and the authority in its support, that the injury inflicted and threatened, if any, was done and directed to the mortgagor in possession, and is too remote to give the complainants the right to sue. It may be conceded that there is no express decision of the Supreme Court or of other courts of authority on this question, but as to this point the case of Peik vs. Railway Co., in 94 U. S., 164, is substantially the same as these cases. That case was strongly controverted. Lawyers of the highest national reputation argued it elaborately and at great length in the Supreme Court. The same question was involved in the case of Stone vs. Trust Co., 116 U. S., 307; and, while the failure to raise or notice this question in the progress and decision of those cases prevents their being relied on as authority on this point, the fact that it was not raised or noticed is persuasive in the direction of the inclination of my judgment in this case that complainants show a right to sue. The case of Murdock vs. Woodson persuades to the same conclusion. 2 Dill., 188, et seq."

It will be observed that the case just cited goes far beyond anything that is necessary to sustain the jurisdiction in the case at bar.

In the Mercantile Trust Company's case no antagonism whatever developed between the complainants and the defendant railroad companies; on the contrary, they both sought the same relief against the same defendants and upon the same grounds; and the Supreme Court of the United States affirmed the decrees made by the lower court in favor of the complaining mortgagees.

Reagan vs. Farmers Loan & Trust Co.,
154 U. S., 362.

In Bowdoin College vs. Merritt, 63 Fed., 213, it was held by Mr. Justice McKenna, then circuit judge, that—

> "Refusal of trustees to sue, thereby enabling the cestui que trust to bring the action in a federal court, as involving a controversy wholly betwen citizens of different states, will not be held collusive, thus subjecting the action to dismissal under Act March 3, 1875, section 5, though they were willing the cestui que trust should bring the action, and were friendly to it, where they would not have sued under any circumstances, for the reason that they would have had to sue in a state court, and thought that an effort would there be made to unduly influence the jury."

And, further, that—

> "Where, on the refusal of trustees to bring an action against a citizen of the same

state, the cestui que trust, a citizen of another state, brings the action in a federal court, joining the trustees as defendants, the answer of the trustees, admitting all the allegations of the bill, including one that they refuse to sue, does not show that they have changed their attitude, and are no longer antagonistic to the complainant, and thus deprive the federal court of jurisdiction of the action, as one no longer between citizens of different states."

And in stockholders' suits it has been repeatedly held that the action of the pleader, in aligning the corporation as a party defendant, cannot be disturbed and diversity of citizenship thereby destroyed, if it appears that the managing officers of the corporation and the controlling majority in the stockholders are for any reason opposed to the object of the suit, even though it further appear that the ultimate interest of the corporate defendant is the same as that of the complaining stockholder.

New Albany Water Works vs. Louisiana Banking Co., 122 Fed., 776.

Groel vs. United Electric Co., 132 Fed., 252.

Loose vs. Hartford Plaster Corporation, 159 Fed., 318.

Kelly vs. Miss. River Coaling Co., 175 Fed., 482.

Howard vs. National Telephone Co., 182 Fed., 215.

Reliance is placed upon the fact, shown by the affidavit of Anderson (Transcript, p. 265), that some months prior to the filing of the bill Mr. Vaile, one of the solicitors for the complainant, was acting in an advisory capacity to Mr. Moffat, president of the defendant Water Company; but Mr. Vaile might very well have then been acting for the Trust Company and advising Mr. Moffat in conjunction with the attorneys for the Water Company, to the end that the interests of the bondholders might be fully protected. Or if he were then employed by the Water Company, no reason is perceived why he should not in the interval have severed that connection and accepted the employment of the Trust Company. Clearly, the information furnished by Mr. Anderson is wholly insufficient to support the charge of collusion.

But it is further asserted that, under the provision of the Water Company's mortgage, that Company is bound to reimburse the Trust Company for costs and expenses of litigation undertaken by the Trust Company, pursuant to the terms of the deed of trust.

Let us assume that this is a suit of the character mentioned in that provision of the trust deed relied upon by the appellants, which, however, is by no means clear. Certainly there is no evidence that the Water Company has paid or is paying the expenses of this suit; and there is no evidence that the suit was brought by the Trust Company or is being maintained at the expense or request of the Water Company. Admitting, for purposes of the argument, all that appellants contend for in this particular, nothing would appear except that under the terms of

the mortgage the Trust Company might at some future time, and by proper form of action, enforce against the Water Company a claim for the Trust Company's disbursements, made in connection with this suit. Suppose this to be true. What of it? The fact remains that the Water Company has refused to bring the suit; that it is opposed to the object for which the suit is brought, and considers that its interests and those of its stockholders will be greatly prejudiced if the object of the suit is attained. On the other hand, unless the trustee for the bondholders may bring and maintain this suit, it will not be brought at all, and in that event, as the trustee for the bondholders avers, the interests of the bondholders will be greatly prejudiced.

In New Albany Water Works vs. Louisiana Banking Company, 122 Fed., 776, it was held by the Circuit Court of Appeals for the Seventh Circuit that—

> "The jurisdiction of a federal court of a suit in equity by a non-resident stockholder to enjoin an alleged breach of trust by the directors of the corporation, or other violation of corporate duty, is not affected by the fact that he is acting in concert with other stockholders, who are citizens of the same state as the corporation, or that such stockholders contribute to the expenses of the suit, where the controlling majority in the stockholders and directors is opposed to the objects of the suit; and there is therefore no collusion, in the sense of the statute, or within the meaning of equity rule 94."

Where antagonism actually exists, or where there is an unsatisfied demand, although the same be undisputed by the defendant, there is a justiciable controversy, and the federal court has jurisdiction upon the ground of diversity of citizenship, without regard to the motive of the parties in creating that situation.

South Dakota vs. North Carolina, 192 U. S., 286, 311.

Blair vs. Chicago, 201 U. S., 400, 448.

Chicago vs. Mills, 204 U. S., 321.

Re Metropolitan Receivership, 208 U. S., 90, at 107.

In re Cleland, 218 U. S., 120.

In Blair vs. Chicago, *supra,* it is said (p. 448):

"As to the conspiracy to get the case into the Federal court, with a view to the decision of the rights of the parties therein, we are not aware of any principle which prevents parties having the requisite citizenship and a justiciable demand from seeking the Federal courts for redress, if such be their choice of a forum in which to have contested rights litigated. Having a proper cause of action and the requisite diversity of citizenship confers jurisdiction upon the Federal courts, and in such cases the motive of the creditor in seeking Federal jurisdiction is immaterial. South Dakota vs. North Carolina, *supra;* Dickerman vs. Northern Trust Company, 176 U. S., 181, 190; Lehigh Mining and Manufacturing Company vs. Kelly, 160 U. S., 327, 336;

Crawford vs. Neal, 144 U. S., 585; Cheever vs. Wilson, 9 Wall., 108, 123; Smith vs. Kernochen, 7 How., 198, 216.

It is true that the judgments were taken and the receivers appointed on the same day, and it is quite likely that the receiverships were in view when the judgments were taken, and that preparations had been made in that direction, but we perceive in this no legal objection to the jurisdiction of the court."

In Chicago vs. Mills, *supra*, it is said (p. 328):

"The record discloses that the company's counsel came to New York, where a conference was had with the counsel retained by Mills, and a difference of opinion was developed as to the propriety and advisability of a new suit which would cover the points in difference. The result of this conference was that the company's counsel notified counsel for Mills that he should avise the board to decline the request to bring a new suit."

* * * * * * * *

(P. 329): "In this attitude of affairs counsel might well advise that the protection of the stockholders' interest required the beginning of a suit which should embrace the vital questions in issue. There was a sharp difference of views between the representatives of Mills and those of the company's solicitors as to the advisability of bringing an action.

For the prudential reasons outlined in their letter of January 29, 1903, above re-

ferred to, the directors of the company declined to bring the suit."

* * * * * * * *

(P. 330) "As we have said, we think the record establishes that complainant and his counsel honestly believed that such new suit was necessary to protect the stockholders' interests. There is an entire lack of testimony to show any collusive action at the time of the beginning of the suit.

It is true that subsequent events made it to the interest of the company to make common cause with Mills against the enforcement of the ordinance in question, but when he began his suit no proceedings were pending which involved the important question of the power of the city upon which the complainant ultimately prevailed.

It is true that an officer of the company, who was the next largest stockholder to Mills, contributed to the expenses in this suit; but he testified, and there is nothing in the record to contradict him, that he paid this money from his own resources without actual repayment or any understanding with the company that he should be reimbursed.

It is true that Mills' counsel was retained in the suit in this court after the beginning of his suit in Chicago (a suit brought by the company).

It is also true that, in answering to a question put in the language of the ninety-fourth rule as to whether the suit was brought to confer upon the Circuit Court of

the United States jurisdiction in a case of which it would not otherwise have cognizance, complainant answered that he so understood it, but subsequently said that he did not understand the question. This admission, intentionally made, would not necessarily show collusion.

* * * * * * * *

When a citizen of one state has a cause of action against a citizen of another state which he may prosecute lawfully in a Federal court, and when the suit is free from fraud or collusion, his motive in preferring a Federal tribunal is immaterial."

In In re Metropolitan Railway Receivership, *supra,* it is said (p. 110):

"In this case we can find no evidence of collusion, and the Circuit Court found there was none. It does appear that the parties to the suit desired that the administration of the railway affairs should be taken in hand by the Circuit Court of the United States, and to that end, when the suit was brought, the defendant admitted the averments in the bill and united in the request for the appointment of receivers. This fact is stated by the Circuit Judge; but there is no claim made that the averments in the bill were untrue, or that the debts, named in the bill as owing to the complainants, did not in fact exist; nor is there any question made as to the citizenship of the complainants, and there is not the slightest

> evidence of any fraud practiced for the purpose of thereby creating a case to give jurisdiction to the Federal court. That the parties preferred to take the subject-matter of the litigation into the Federal courts, instead of proceeding in one of the courts of the state, is not wrongful. So long as no improper act was done by which the jurisdiction of the Federal court attached, the motive for bringing the suit there is unimportant."

In re Cleland, *supra*, disclosed a case where, by the evidence, the parties had deliberately produced a situation involving diverse citizenship, for the express purpose of bringing in the United States court a suit of which otherwise the state courts would have exclusive jurisdiction. This was accomplished by the transfer of certain stock to a non-resident, so that he might bring suit in the federal courts against the corporation. The sole question presented to the Supreme Court was upon the contention "that the suit does not really and substantially involve a controversy within the jurisdiction of that [the Circuit] Court." In the course of the opinion the Supreme Court says (p. 121):

> "There were provisions in the Michigan statutes for such cases, but after conference with the secretary of state, now the governor of Michigan, the attorney general of the state and officers of the corporation, it was decided that the most saving and beneficial course would be to have a receiver appointed by the United States Court, the assets of the

company being partly scattered in distant states. As the requirement of proceedings under the state law was understood to be mandatory upon the secretary of state, the beginning of this suit was hastened. To that end Aldrich, who had been counsel for the corporation, and who wanted to be appointed receiver, transferred and procured to be issued certificates of stock to a friend of his, Bishop, the original plaintiff, and Bishop thereupon signed and swore to the bill, alleging the par value of his stock to be over $2,000. No doubt he intended thereby to help Aldrich, but he also understood that he was acting for the benefit of all concorned, and, undoubtedly, one reason for applying to him was to save time in getting a non-resident shareholder. It was for the benefit of all, in fact. The answer to the present petition states that all the shareholders have come in. Moreover, although it was disputed at the bar, we see no ground for denying that, on the face of the bill, the jurisdiction of the court was established. * * *"

(P. 122): "It is said that, on the undisputed facts, Bishop was not a bona fide shareholder, and that the proceeding was collusive. But the first proposition is not true, and the second is not law. Bishop became the absolute owner of the shares in his name. The answer to the petition so finds, and there is no question about it. * * * As to collusion, there is nothing unlawful in

transferring shares to a man out and out, for the convenience of immediately beginning a suit that other shareholders have a right to begin; that all parties in interest want to have begun, and that the authorities of the opposing jurisdiction approve."

See also:

Knickerbocker Trust Co. vs. City of Kalamazoo, 182 Fed., 865, 868.

Without prolonging this discussion further, it is sufficient to say that under the foregoing authorities there is no evidence whatever of any improper act, of any fraud, of any misrepresentation or shuffling of facts, for the purpose of creating an apparent jurisdiction. Therefore there has been no collusion.

Appellants' Authorities.

The authorities cited by appellants do not sustain their position upon this branch of the argument.

Dawson vs. Columbia Trust Company, 197 U. S., 178, is much relied upon. There the trustee in the water company's mortgage brought the suit, making the water company as well as the city parties defendant. But it affirmatively appeared that there was no conflict of interest in any particular between the trust company and the water company. It was also shown that the suit had been brought in the federal court by the trustee, in order to avoid the effect of a decision by the Supreme Court of the State

of Georgia, wherein the water company had sought exactly the same relief against the city upon the same grounds and under the same theory advanced by the trustee in the federal court. In the state courts the contention had been overruled. The Supreme Court said (p. 180):

> "The Water Works Company is admitted to have been a necessary party, and it, like the defendant City, was a Georgia corporation. It was made a defendant, but the court will look beyond the pleadings and arrange the parties according to their sides in the dispute. When that is done it is obvious that the Water Works Company is on the plaintiff's side, and was made a party solely for the purpose of re-opening in the United States court a controversy which had been decided against it in the courts of the state. There was a pretense of asking relief against it, as we have stated, *but no foundation for the prayer was laid in the allegations of the bill.* On the contrary, it appears from those allegations that the Water Works Company insisted on its contract with the City, and did everything in its power to carry the contract out. It also recognized the plaintiff's right to receive the rentals and yielded to its demand. *No difference or collision of interest or action is alleged or even suggested.*"

Clearly, the Dawson case has no application whatever to the facts presented by the case at bar.

In Stephens vs. Smartt, 172 Fed., 466, it appeared without dispute that there was no actual, or even pretended, antagonism between the complainant and the church corporation, of which he was a member, and which he made a defendant. If such antagonism had appeared, jurisdiction could not have been denied, as the court expressly recognizes in the opinion.

In the absence of the numerous decisions which we have cited, the authorities relied upon by appellants would not have sustained their position. In the face of the repeated decisions to which we have called attention, appellants' authorities are without persuasive force.

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2. *Appellants' Contention that if the Original Bill Fails, the Cross-Bill Must Fail, without Regard to Its Jurisdictional Allegations.*

This contention is discussed at page 52-56 of petitioners' brief, but it is frequently referred to in other portions of the argument. It is asserted (p. 52):

> "The allegations of the bill, of course, determine the existence of a federal question. They may not be aided by those of the answer or cross-bill."

From which the conclusion is drawn that if the original bill fails, the cross-bill must go with it, although the latter contained within itself jurisdictional averments amply sufficient to sustain it, had it been filed

as an original bill. The two difficulties with appellants' argument are that the premises are unsound and that the conclusion does not follow.

In Sanders vs. Village of Riverside, 118 Fed., 720, it was held by the Circuit Court of Appeals for the Seventh Circuit that—

> "The filing of a cross-bill in a suit to quiet title, alleging possession in defendant, and praying that its own title be established and quieted, confers jurisdiction on a court of equity to determine the question of title, as between the parties, and grant relief to the one entitled to the same, although the fact that plaintiff was not in possession would have defeated the jurisdiction upon the original bill."

And in the course of the opinion it is said (p. 722):

> "The cross-bill presented a cause that was purely of equitable cognizance. The effect of this was stated accurately, we think, in Cockrell vs. Warner, 14 Ark., 364:
>
> 'The cross-bill, founded on matters clearly cognizable in equity, supplied any defect in jurisdiction, if any existed, and placed the court in possession of the whole cause, and imposed the duty of granting relief to the party entitled to it. The original bill and cross-bill are but one cause (3 Daniell, Ch. Pl., 1943; Kemp vs. Mackrell, 3 Atk., 812; Field vs. Schieffelin, 7 Johns. Ch., 252); and it certainly can not be at all material from what

particular source jurisdiction arose, provided it existed in the case.'"

In Radcliffe vs. Scruggs, 46 Ark., 96, at 102, it is said:

> "But even if Mrs. Tate was not in a situation, by reason of being out of possession, to maintain a bill of this nature, yet when Scruggs filed a cross-bill founded on matters clearly cognizable in equity, this supplied any defect of jurisdiction, placed the court in possession of the whole cause and imposed the duty of granting relief to the party entitled to it—the original and cross-bill being but one cause."

Where jurisdiction is dependent upon the amount in controversy, the cross-bill as well as the original bill must be taken into consideration.

> Kirby vs. American Soda Fountain Co., 149 U. S., 141, 145.
>
> Howe vs. Howe & Owen Co. (C. C. A., 8th Cir.), 154 Fed., 820.

It thus appears that jurisdiction of the entire cause, including that of the original bill, may be conferred by the allegations of the cross-bill. The cases cited by petitioners on page 52 and 56 of their argument relate exclusively to the point that a federal question, introduced for the first time by answer, for purposes of defense and not as the foundation of any right upon which affirmative relief is sought, cannot

avail to give federal jurisdiction. This is true because of the peculiar language of the Judiciary Act, as construed by the courts, to the effect that the words "arising under the Constitution or laws of the United States" require that the cause of action be based thereon, and do not relate to matters of defense. But a cross-bill is a pleading of quite a different character from an answer; instead of being wholly defensive, it seeks affirmative relief; it is a sword, and not a shield; a weapon of attack rather than of defense; and if the cause of action which it sets forth is one "arising under the Constitution or laws of the United States," the federal courts have jurisdiction. In such a case the dismissal of the original bill, whether voluntarily or by action of the court, does not carry with it the cross-bill. The latter must be retained and full relief decreed thereon according to the rights of the cross-complainant therein set forth.

Bates' Federal Equity Procedure, sec. 386.

1 Foster's Federal Practice, pp. 606, 607.

Street's Federal Equity Practice, sec. 1072.

Bowker vs. United States, 186 U. S., 135, 141.

Jackson vs. Simmons (C. C. A., 7th Cir.), 98 Fed., 768, 773.

Small vs. Peters, 104 Fed., 401.

San Diego Flume Co. vs. Souther (C. C. A., 9th Cir.), 90 Fed., 164, 167.

Badger Gold Mining Co. vs. Stockton Mining Co., 139 Fed., 838.

Craig vs. Dorr (C. C. A., 4th Cir.), 145 Fed., 307.

Lowenstein vs. Glidewell, 5 Dill., 325; F. C. No. 8575.

These authorities establish the rule beyond question that where, as is the case here, a cross-bill seeks affirmative relief, either against the original complainant or against a co-defendant, the dismissal of the original bill does not carry the cross-bill with it; but the court must retain the cross-bill and decree full relief thereon to the cross-complainant and against those made defendants thereto; and this will be done, even where the pleading is not a true cross-bill, provided it contains within itself the proper jurisdictional averments.

It follows that petitioners are wrong in concluding that the averments of the cross-bill may not be considered by the court for the purpose of determining whether federal jurisdiction to entertain the cross-bill exists.

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3. Realignment of Parties Requires Realignment of Contentions, Thus Importing into the Original Bill the Federal Questions Presented by the Cross-Bill.

Petitioners strongly assert that the matters presented by the original bill and those presented by the cross-bill might all have been consolidated in one bill, and the several contentions now made by each party presented by a single pleading; and authorities are cited to support the contention at page 44 of their brief. But, in the case at bar, the court can never reach the consideration of the sufficiency of the fed-

eral questions involved unless it shall first determine that diversity of citizenship is lacking in the original bill; and it cannot so determine unless it shall hold that the parties must be realigned, so that the defendant and cross-complainant Water Company shall stand as an original plaintiff, side by side with the Trustee; but this result can be achieved only by holding that there is no antagonism between the Water Company and the Trustee; that what the Water Company alleges and the relief which it seeks by its cross-bill are not inconsistent with the allegations and object of the original bill, with the result that all of those allegations should have been embraced, the respective objects sought and the respective relief prayed in and by the original bill brought either in the name of the Trustee, in the name of the Water Company, or in the name of both jointly. This it is necessary to determine in order to destroy the diversity of interest and of citizenship alleged in the original bill. But when the court so determines, is it not plain that thereby it imports into the original bill the various matters alleged in the answer and cross-bill of the Water Company? Is it not evident that the parties cannot be realigned to suit the contention of the appellants, without also realigning their respective contentions? There can be but one answer to these questions. The court is bound to assume that if one original bill had been filed, either by the Trustee or by the Water Company, or by both jointly (provided that this could have been done without violating the rules of good pleading), the complainant or complainants in that case would have set forth in their bill every contention which is now advanced

both in the original bill and in the cross-bill, with the result that the original bill would have contained not only the federal questions now presented thereby, but also those which arise upon the face of the cross-bill.

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4. Federal Questions Presented by the Cross-Bill.

The federal questions presented by the cross-bill are as follows:

(a) That section 264A is in conflict with section 10 of Article I of the Constitution of the United States, in that it impairs the obligation of prior existing contracts between the City and the Water Company. (Cross-Bill, paragraph Fifteenth, p. 132.)

(b) That section 264A is in conflict with the provisions of the Fourteenth Amendment to the Constitution of the United States, in that thereby the Water Company is denied the equal protection of the laws. (Cross-Bill, paragraph Sixteenth, p. 133.)

(c) That section 264A is in conflict with the Fourteenth Amendment of the Constitution of the United States, in that it is an attempt to deprive the Water Company of its property without due process of law, and that the acts of the City and its representatives likewise constitute an attempt, under the sanction of the state, to deprive the Water Company of its property without such due process, in conflict with said amendment. (Cross-Bill, paragraph Seventeenth, p. 135.)

(d) That Article XX of the Constitution of the State of Colorado, and all acts done and steps taken thereunder, including the adoption of the present city

charter of Denver, and said amendment thereto, designated as section 264A, are unconstitutional and invalid, and in conflict with section 4, Article IV, of the Constitution of the United States, in that thereby a republican form of government is destroyed. (Cross-Bill, paragraph Eighteenth, p. 136.)

The contention stated in paragraph (d), *supra*. relating to a republican form of government, was brought forward by the cross-bill as an objection to the validity of section 264A, and strongly urged, both in the Circuit Court and in the Circuit Court of Appeals. It was presented and argued in the utmost good faith, and the brief filed in the Circuit Court of Appeals contains an elaborate discussion thereof, with the citation of numerous authorities. It was pointed out that in previous decisions of this court the question had been regarded as one of sufficient importance to justify federal jurisdiction.

> Siler vs. Louisville & Nashville R. Co., 213 U. S., 175.
>
> Home Telephone & Telegraph Co. vs. Los Angeles, 211 U. S., 265, 280.

The point was thereupon argued at considerable length upon its merits, and the argument supported by the citation of numerous cases, including several decisions of this court, which were considered applicable.

It is unnecessary to here repeat what was there said, because the decision of this court in Pacific States Telephone & Telegraph Co. vs. Oregon, 223 U. S., 118, announced February 19, 1912, determines the question against our contention. But that case was

not decided by this court until long after the commencement of this suit, and, indeed, not until long after the decision of the Circuit Court of Appeals herein. The fact that at the commencement of this suit, and at all times thereafter, until February 19, 1912, this question was sufficiently grave and sufficiently doubtful to furnish a proper basis for the jurisdiction of a federal court is conclusively demonstrated by the consideration that during all of that time the Pacific States Telephone case was deemed to be within the jurisdiction of this court, and was finally decided by this court upon its merits, although the sole ground of jurisdiction, and the sole ground upon which this court could entertain the appeal, was the assertion, as a federal question, of precisely the same contention here made by this cross-complainant.

U. S. Comp. Statutes 1901, p. 575, sec. 709.

Murdock vs. Memphis, 20 Wall., 590, 619, 620.

Smalley vs. Langenour, 196 U. S., 93, 96.

Of course, the fact that this court has recently negatived the contention upon its merits does not affect its validity as a ground of federal jurisdiction, when asserted as such in a suit commenced before said decision.

The other federal questions presented by the cross-bill are fully discussed and explained in preceding portions of this argument, to which we now refer. (See *supra*, I, 10, (b), (c), pp. 174, 184; II, 8, 9, pp. 268-280.)

To again present that discussion would involve needless repetition. Upon what was there said, we

submit that these questions are meritorious and must be solved in favor of the contention of this respondent. In any event, it is certain that they are not so manifestly devoid of merit as to warrant the conclusion that they were not interposed in good faith. For purposes of jurisdiction of the federal courts, it is not at all necessary that the contention in respect to a federal question should be well founded, or even that the question should be decided at all; but if such a question is properly presented, the court has jurisdiction of the case, and may decide it upon purely local questions, even though the federal question be decided adversely to the contention of the complainant, or not decided at all.

Vicksburg Co. vs. Vicksburg, 185 U. S., 65, 82.

Merc. Trust Co. vs. Columbus, 203 U. S., 311, 322.

Siler vs. Louisville & Nashville R. R. Co., 213 U. S., 175.

Ex Parte Young, 209 U. S., 123.

Omaha Horse Ry. Co. vs. Cable Co., 32 Fed., 727.

Des Moines City Ry. Co. vs. City of Des Moines, 151 Fed., 854, 859.

In Siler vs. Louisville & Nashville R. R. Co., *supra,* the court said (p. 191):

> "The Federal questions, as to the invalidity of the state statute because, as alleged, it was in violation of the Federal Constitution, gave the Circuit Court juris-

diction, and, having properly obtained it, that court had the right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only.

This court has the same right, and can, if it deem it proper, decide the local questions only, and omit to decide the Federal questions, or decide them adversely to the party claiming their benefit. Horner vs. United States (No. 2), 143 U. S., 570, 576; Fallbrook Irrigation Dist. vs. Bradley, 164 U. S., 112, 154; Penn Mutual Life Insurance Co. vs. Austin, 168 U. S., 685, 694; Burton vs. United States, 196 U. S., 283, 295; Williamson vs. United States, 207 U. S., 425; People's Savings Bank vs. Layman, 134 Fed. Rep., 635; Michigan Railroad Tax Cases, 138 Fed. Rep., 223."

In the case at bar, both the Circuit Court and the Circuit Court of Appeals have not only determined that the federal questions interposed, or at least some of them, are sufficiently meritorious to uphold the jurisdiction of the national courts, but have decided the case thereon in favor of the contention of respondents. We respectfully submit that this circumstance is conclusive evidence that the federal questions presented are not so manifestly devoid of merit as to warrant the conclusion that they were not interposed in good faith.

5. *Petitioners' Contention that Acts in Violation of Provisions of the Federal Constitution Present No Federal Question if They Also Violate Like Provisions of the State Constitution. (Doctrine of Barney vs. City of New York 193 U. S., 430.)*

But it is suggested, rather than argued, by the petitioners that, by reason of the fact that the cross-complainant has alleged grounds for the invalidity of section 264A, other than those of a federal nature, it has thereby committed a legal *felo de se,* and destroyed the federal questions, because, as is claimed, if section 264A be invalid on grounds not involving any federal question, it cannot in that event be the act of a state, and therefore not within the provisions of the Federal Constitution relative to the impairment of contract, the deprivation of property or the equal protection of the laws, This argument ignores the fact that one of the principal grounds for challenging the measure as not proper state action was its conflict, and that of the state constitutional provision under which it was enacted, with section 4 of Article IV of the Federal Constitution relating to a republican form of government.

In support of this branch of their argument, appellants, on page 156 of their brief, cite Barney vs. City of New York, 193 U. S., 430. But the Barney case as an authority must, like all other decisions, be considered in the light of the facts to which it related. It appeared that Barney brought a bill to enjoin the City of New York, the Board of Rapid Transit Commissioners, and others actually engaged in the work, from proceeding with the construction of a rapid transit railroad tunnel adjacent to his premises. It

was alleged that the tunnel was being constructed in a location not authorized by the state statute, nor by the Board of Rapid Transit Commissioners, but without any authority other than certain directions given by a chief engineer employed by said board, whose action had never been formally or specifically approved by the board; that the acts complained of were illegal and unauthorized, and constituted a taking of property without due process of law, in violation of the provisions of the Fourteenth Amendment. No other federal question was involved. The Supreme Court of the State of New York had held that the construction of the tunnel in the location complained of was entirely unauthorized by any state legislation, or otherwise. This determination was, of course, conclusive upon the federal court. As a result, the Barney case presented a situation where the acts complained of were not only without the authority, real or apparent, of the state or any of its agencies, but, on the contrary, directly prohibited thereby; and so the court says (p. 437):

> "Thus the bill on its face proceeded on the theory that the construction of the easterly tunnel section was not only not authorized, but was forbidden by the legislation, and hence was not action by the State of New York within the intent and meaning of the Fourteenth Amendment, and the Circuit Court was right in dismissing it for want of jurisdiction."

But in the case at bar the citizens of Denver, in adopting section 264A, were acting within the author-

ity delegated to them by the state, by virtue of Article XX of the State Constitution; and the Public Utilities Commission of Denver were acting within the authority expressly conferred upon them by said section 264A, in doing and threatening to do the things which are herein complained of.

Article XX of the Constitution of Colorado, adopted November 4, 1902, confers upon the City of Denver, in express words, the broadest possible powers, both of contract, of legislation, and of executive action, particularly in respect of matters relating to water supply (Revised Statutes of Colorado, 1908, p. 56); and thereby the people of Denver were given authority to adopt their own charter for said City, which should "become the organic law thereof and supersede any existing charters and amendments thereof" (Revised Statutes of Colorado, 1908, p. 57). The Supreme Court of Colorado, construing this language, has held that thereby "it was intended to confer not only the powers specially mentioned, but to bestow upon the people of Denver every power possessed by the Legislature in the making of a charter for Denver;" and that, by virtue of Article XX of the Constitution, the City of Denver must be deemed to possess every power which the Legislature of Colorado could have delegated to it, unless the same is expressly reserved.

City of Denver vs. Hallett, 34 Colo., 393, 399.

As a result, it is impossible in this case to say that the City of Denver was not proceeding under a power delegated to it by the state. And it is likewise impossible to say that the officers of the City of

Denver, including the Public Utilities Commission, are not proceeding by the sanction of the state, conferred through its delegate.

To sustain this contention of the appellants would be to hold that a litigant may not in any case attack state legislation or the acts of state officers, for the reason that such legislation and such acts violate both the State and Federal Constitutions, without destroying federal jurisdiction. But all of the decisions are to the contrary.

In Pacific Electric Co. vs. Los Angeles, 194 U. S., 112, decided within a month after the Barney case, it was alleged that certain acts of the council and the mayor of Los Angeles were in conflict with the Constitution of the United States, in that they constituted an impairment of an existing contract and a deprivation of property without due process of law; and by the same pleading it was alleged that their acts were not only not authorized by, but were in conflict with the statute of the state (pp. 115 and 116). Jurisdiction of the federal court was upheld (p. 117).

In Cleveland vs. Cleveland City Railway Co., 194 U. S., 517, decided about two months after the Barney case, the bill alleged violation of the contract clause of the Constitution and of the due process clause of the Fourteenth Amendment. It was claimed that the court was without jurisdiction because the ordinance assailed was one which the city had no power by delegation from the state to pass; but the court overruled the contention, saying (p. 530):

> "The argument is that as there had not been delegated by the state of Ohio to the city of Cleveland independent authority to

reduce rates of fare on street railroads, and as the power asserted by the assailed ordinance was based solely on the right reserved in the ordinance of 1879, it follows that the assailed ordinance, even if unwarranted, was not an impairment of a contract right in the constitutional sense.

This proposition is in conflict with the one just considered, and in effect assumes that the defense of the city was without merit, and hence there was no jurisdiction. But irrespective of the assumption upon which it rests, the proposition is untenable, and the argument by which it is sought to be sustained is somewhat wanting in consistency. The passage by the city of the assailed ordinance necessarily amounted to an assertion on its part that the legislative authority vested in it to pass the ordinance of 1879 gave the continued power to pass subsequent ordinances executing the rights initiated by the ordinance of 1879, despite the ordinances which had supervened. This, in its very essence, was the assertion of a delegated power to legislate against the contracts embodied in the ordinances relied upon."

In Savannah Company vs. Savannah, 198 U. S., 392, the court, commenting upon the Barney case, says (p. 396):

"According to the bill and the fifth assignment of error, there is no law of the state of Georgia which authorizes the imposi-

tion of the tax. Were this true the foundation of our jurisdiction would be gone and this writ of error should be dismissed. See Barney vs. City of New York, 193 U. S., 430. But although the plaintiff has taken inconsistent positions and has confused questions for the state court alone with those which may be brought here, still, since it has shown a clear intent to raise the Federal question from the beginning, since the bill in another place alleges that the tax is an authority exercised under the state of Georgia, and other assignments of error present the point, and since the state court has decided that the tax was authorized, we shall not stop the case at the outset. See Hamilton Gas Light & Coke Co. vs. Hamilton, 146 U. S., 258."

In the Hamilton case cited *supra* the Supreme Court was considering a case wherein the complainant's first contention was that there was no statute of the State of Ohio authorizing the city to do the things which were complained of; but it also alleged that if the statute were construed as conferring such authority upon the city, the acts so authorized impaired the obligation of a contract. The matter is fully discussed and the federal jurisdiction sustained (pp. 265 and 266).

In the Michigan Railroad Tax Cases, 138 Fed., 223, an assessment of the State Board of Assessors was attacked upon the ground (a) that it violated the Fourteenth Amendment of the Federal Constitution; (b) that it violated section 8 of Article I of the Fed-

eral Constitution, in attempting to regulate commerce among the several states; (c) that it violated section 4 of Article IV of the Federal Constitution in respect to a republican form of government. The assessment was also attacked upon the ground that the state statute which purported to authorize the same, and without which it would have been without any apparent state authority, was invalid because in conflict with various provisions of the Michigan Constitution. The matter is fully discussed at pages 230 and 231, and the jurisdiction of the federal court is sustained. The decrees were affirmed by the Supreme Court.

> Michigan Central vs. Powers, 201 U. S., 245.

The decision of the Circuit Court has been subsequently referred to with approval (213 U. S., 191).

In Raymond vs. Chicago Traction Co., 207 U. S., 20, where a similar contention was made, it is said (p. 37):

> "Barney vs. City of New York, 193 U. S. 430, holds that where the act complained of was forbidden by the State Legislature, it could not be said to be the act of the State. Such is not the case here."

But the entire matter is conclusively determined against the contention of appellants by the case of Siler vs. Louisville & Nashville R. R. Co., 213 U. S., 175. In that case the court was considering a bill filed by the railroad company to enjoin the enforcement of a certain order made by the railroad commission of Kentucky. In its bill the company contended that the

order was void because, upon several stated grounds, in violation of certain named provisions of the Constitution of the United States. The company also contended (among other objections not of a federal nature) that the commission had no power to make the order in question, under a correct and proper construction of the state statute under which the commission assumed to exercise the power. The court says (p. 190):

> "The appellants deny the jurisdiction of the Circuit Court in this case. There is no diverse citizenship in the case of this particular company, and the jurisdiction must depend upon the presence of a Federal question. The bill filed by the company herein attacked the validity of the act of the legislature of Kentucky of March 10, 1900 (above set forth in full), on several grounds, as in violation of section 1 of the Fourteenth Amendment. It was also averred that the act was a violation of Section 4, Art. IV, of the Federal Constitution, in that it constituted an abandonment by the State of Kentucky of a republican form of government, in so far as it vested legislative, executive and judicial powers of an absolute and arbitrary nature over railroad carriers in one body or tribunal, styled the railroad commission The company also contended that the act was in violation of the Federal Constitution, on account of the enormous fines and penalties provided in the act as a punishment for a violation of any of its provisions; also that the enforcement of the

act would operate to deprive the company of its property without due process of law, and would deny to it the equal protection of the laws, in violation of Section 1 of Art. XIV, of the Amendments to the Constitution of the United States. Other grounds of alleged invalidity of the act in question, as in violation of the Federal Constitution, are set up in the bill. *The bill also contained the averment that the order of the railroad commission of Kentucky, in making a general schedule of maximum rates for the railroads mentioned in its order, was invalid, as unauthorized by the statute. This is, of course, a local or state question.*"

* * * * * *

(P. 192): "The character of some of the Federal questions raised is such as to show that they are not merely colorable, and have not been fraudulently raised for the purpose of attempting to give jurisdiction to a Federal court.

The appellants, however, contend that the jurisdiction of the Circuit Court did not attach under the Fourteenth Amendment, because of the allegations contained in the bill of the company, in which was contained an averment that the defendants below (the appellants here) had not been vested with the power, by either the constitution of the State of Kentucky or by any act of its Legislature, or by any law, to make and enter the order of July 20, 1906, complained of in the company's bill. The argument of the appellants

is that in order to violate the Fourteenth Amendment the action complained of must be under the authority of the state, and *where the allegation of the bill was that 'no power or authority had been vested in or conferred upon the appellants by the act of March 10, 1900, or by any law, to make or fix the rates complained of,'* such allegations swept away the foundation for the claim of Federal jurisdiction, inasmuch as in such case the action of the railroad commission was not the action of the State, and the principle decided in Barney vs. City of New York, 193 U. S., 430, 437, was applicable.

If the averment as to the invalidity of the order of the commission were the only ground upon which a Federal question was founded, and if the bill alleged that the order was invalid because it was not authorized by the State, either by statute or in any other way, the objection might be good, but the bill sets up several Federal questions. Some of them are directed to the invalidity of the statute itself, on the ground that it violates various named provisions of the Federal Con stitution in additon to and other than the Fourteenth Amendment, while some of the other Federal questions are founded upon the terms of the order made by the commission, under what is claimed by the commission to be the authority of the statute. The bill also sets up several local questions arising from the terms of the order, and which the company claims are unauthorized by the

statute. The various questions are entirely separate from each other. Under these circumstances there can be no doubt that the Circuit Court obtained jurisdiction over the case by virtue of the Federal questions set up in the bill, without reference to the particular violation set up in regard to the Fourteenth Amendment."

See also:

Manigault vs. Ward, 123 Fed., 707.
San Francisco Co. vs. San Francisco, 189 Fed., 943.

In the present case no claim is made by cross-complainant that the acts of the City are beyond the powers which the state has attempted to delegate. On the contrary, it is admitted that the state has, by Article XX of the Constitution, attempted to delegate the powers, and that the acts complained of are within the scope of the powers so delegated. If it were true that in any case where both federal and non-federal objections were made in the same pleading, the presentation of the non-federal questions would destroy federal jurisdiction, because their decision might remove the federal questions from the case, necessarily it would also be true that federal jurisdiction must fail whenever, by adverse decision, the federal questions were removed from the case as inapplicable.

Most, if not all, of the state constitutions contain prohibitions similar to those of the Federal Constitution, and directed against the impairment of contract, the deprivation of property without due process

of law, and the denial of the equal protection of the laws, by state action. This is true of the Colorado Constitution.

If petitioners' contention were well founded, then every act of the state which impaired the obligation of a contract, or which amounted to a deprivation of property without due process of law, or which denied the equal protection of the laws, would be void under the State Constitution. As a consequence, if petitioners be correct in their contention, then no case of federal cognizance could ever be made, based upon state action, in conflict with the provisions of the Federal Constitution relative to impairment of contracts, due process of law, or equal protection of the laws. Such a situation is inconceivable; a multitude of authorities deny its existence.

V.

PETITIONERS' CONTENTION THAT THE TEMPORARY INJUNCTIONS WERE ISSUED BY A TRIBUNAL FORBIDDEN, UNDER A RECENT FEDERAL STATUTE, TO MAKE THE ORDERS.

This contention is set forth in petitioners' brief, beginning at page 224. We will not discuss the question as to whether the district judge holding the Circuit Court could alone consider the applications for and order the issuance of the temporary injunctions. If that question were properly presented by this record, we entertain the utmost confidence that the court would, under the circumstances, affirm the propriety

of the proceeding. This phase of the question will be discussed by other counsel, and, to avoid repetition, we shall leave it untouched.

But we call attention to the fact that, under the act of Congress referred to by petitioners (sec. 17, Act of June 18, 1910; 36 Stats. 557), if the same be applicable, the requisite tribunal must consist of three judges, one of whom shall be "a justice of the Supreme Court of the United States, or a circuit judge, and the other two may be either circuit or district judges."

The temporary injunctions in this case were issued on September 6, 1910 (Record, pp. 270, 272). On May 19, 1911, a tribunal, consisting of their honors, Circuit Judge Hook and District Judges Riner and Reed, having fully reviewed the action of the district judge, and the matter having been argued before them at length, upon the same record which the district judge had considered, affirmed in every particular the action of the lower court, and determined that the temporary injunctions were rightly issued. (Printed Record, p. 335.) Accordingly, said tribunal affirmed and confirmed the action in all respects. But this tribunal was exactly such as the statute of 1910 contemplated. Therefore, we submit that the objection now made to the temporary injunctions was available to the petitioners, if at all, only between the date of their original issuance and the date when they were confirmed by the Circuit Court of Appeals. The question is now moot.

But, beyond this, we submit it to be well settled that a court will not do that which is nugatory. The reversal of the present injunctive orders for the reason now assigned would be a vain act. And for this reason: The decision of the Circuit Court of Appeals is

conclusive upon and binds every court within the Eighth Judicial Circuit. If, therefore, this court should reverse the orders of the Circuit Court, solely because the orders were not made by an authorized tribunal, without making any determination of the merits of the controversy, all federal judges sitting in the Eighth Circuit, even justices of the Supreme Court would be bound by the previous decision of the Circuit Court of Appeals, and required, upon new applications for temporary injunctions, to forthwith issue the same. Will this court require the performance of such a useless formality before it considers the other questions presented by this record?

CONCLUSION.

The present writs of certiorari bring up for review records wherein the action of the lower courts complained of is the granting of temporary and interlocutory injunctions. If these were the only matters here involved and to be determined, aside from the jurisdictional controversy, the sole question would be: "Did the Circuit (now District) Court err in the exercise of its judicial discretion when it ordered a temporary injunction?" The rule being that, on appeal from an order granting a temporary injunction, nothing less than a manifest abuse of this discretion will warrant a reversal, and the merits are not necessarily considered.

Denver & Rio Grande R. R. Co. vs. United States, 124 Fed., 156, 161.

Colorado Eastern R. R. vs. Chicago, Burlington & Quincy R. R., 141 Fed., 898-900.

Ellison vs. Corsin, 88 Fed., 581, 584.

City of Newton vs. Levis, 79 Fed., 715, 718.

St. Paul Co. vs. Northern Pacific, 49 Fed., 306, 308.

Counsel for both the City and the other parties have, however, from the first argument before District Judge Lewis, treated the record as sufficient to warrant arguments and decisions on the merits.

Before the Circuit Court of Appeals this attitude of all counsel was emphasized and reiterated, and a common prayer made for a final determination. The authorities approving such action were cited and quoted from in the City's brief before the Circuit Court of Appeals (pp. 66-71). This request and these authorities are conspicuously missing in the present City brief, although the city attorney joined us in a common request to advance the hearing of these writs because of the large public interests involved, and the manifest advantages of a speedy and final determination.

The right of this court to render final judgment on the merits upon these appellate proceedings, with the present record before it, on account of the thorough discussion by all parties in their briefs of the merits of the controversy, and particularly in view of the previous requests and attitudes of counsel thereon, is clearly set forth in the following authorities:

Smith vs. Vulcan Iron Works, 165 U. S., 518, 525.

Mast, Foos & Co. vs. Stover Mfg. Co., 177 U. S., 485, 494-495.

Harriman vs. Northern Securities Co., 197 U. S., 244, 286-287.

Nashville vs. Africa, 77 Fed., 501, 505.

A summarization of the arguments which have preceded will not be attempted, but freely admitting that there must always be present the legal or equitable rights which call into action equitable remedy, still there is always an atmosphere which surrounds a litigation and gives a color to the countervailing contentions.

The attitude of the parties, the integrity of their respective purposes, their patent fairness under a complex situation, and, above all else, their utmost good faith, create this atmosphere.

The Water Company has tried, as we believe this record discloses, to discharge its contractual and public duties to the City of Denver and its inhabitants. It participated in good faith in an appraisement of its property with the City. The appraisers were men of the highest national and professional character; due time was taken for the important matter in hand, and an award of $14,400,000 was made under this appraisement.

Neither this appraisement nor the award has been challenged, but, without valid legal reasons, in disregard of the contract rights of the Water Company, the City offered $7,000,000 for its property, and coupled such offer with a threat of the construction of a municipal plant. If this threat was within the power of the City, did not destroy contractual rights

of the Company, and was carried forward under legal proceedings, the Water Company was without remedy. But if the City did not choose to purchase at the appraised price, it became obligated to continue the contractual relations, and certainly could not by unconstitutional and illegal methods destroy the property of a company serving it and its inhabitants with water, sufficient in quantity, satisfactory in quality and purity, and at rates concerning which no complaint has been legally made.

Not only is the purpose and intent palpably that of the destruction of property, but the method and means selected are unconstitutional and illegal. Section 264A of the charter is the instrument of destruction which violates, in several particulars, the Federal Constitution, the Constitution of the State of Colorado, and the provisions of the charter of the City and County of Denver.

As this is a suit in equity, dependent upon and influenced by those peculiar principles which have so long been the just pride of this branch of jurisprudence, and which it is both helpful and encouraging to take refuge in, we submit that the record of this case shows the equities to be in favor of the Water Company, and to entitle it to complete and permanent relief against the threatened and wrongful actions of the City.

Respectfully submitted,

GERALD HUGHES,
CLAYTON C. DORSEY,
Solicitors for The Denver Union Water Company.

CITY AND COUNTY OF DENVER *v.* NEW YORK TRUST COMPANY.

CITY AND COUNTY OF DENVER *v.* DENVER UNION WATER COMPANY ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Nos. 642, 643. Argued October 28, 29, 1912.—Decided May 26, 1913.

The exceptional power of this court to review, upon certiorari, decisions of the Circuit Court of Appeals on an appeal from an interlocutory order is intended to be, and is, sparingly exercised; that power does exist, however, in a case where no appeal lies from the final decision of that court.

While the jurisdiction of the Circuit Court in a case where diverse citizenship exists may also rest upon the fact that the case is one arising under the Constitution of the United States, in which case there is an appeal from the judgment of the Circuit Court of Appeals, that is not the case where the alleged infractions of the Constitution are without color of merit, or are anticipatory of defendant's defense.

A suit to enforce a contract between a municipality and a water company for the purchase, as is claimed, by the former of the water plant of the latter and to enjoin the city from constructing another plant, is not without more a case arising under the Constitution of the United States. In such a case the decision of the Circuit Court of Appeals is final and the writ of certiorari may be exercised.

On a review of an order of the Circuit Court of Appeals granting an injunction in an equity case, this court is not confined to considering the act of granting the injunction, but if it determines that there is any insuperable objection to maintaining the bill it may direct a final decree dismissing it.

The various ordinances of the City of Denver, Colorado, granting and relating to the franchise to the Denver Union Water Company considered and construed; and *held* that they did not require the city at the expiration of twenty years to exercise either the option to renew or the option to purchase reserved in the franchise ordinance, nor did they preclude the city from erecting its own plant.

Where a municipal ordinance grants a franchise to such extent as the city may lawfully grant it, the term is not in doubt, if the city charter expressly limits the term of all such grants.

A limitation in the charter on grants by the municipality is as much part of an ordinance subsequently passed as though written into it.

An ordinance providing for appraisal of a water plant and for submitting to the electors whether the contract shall be extended or the plant purchased at the appraised value, does not amount to an election to purchase the plant.

Where the franchise of a water company has expired and the city has lawfully refused to purchase the plant at the appraised value, a charter amendment permitting the municipal authorities to offer the company less than such value and in case of non-acceptance to erect a municipal plant, does not violate the due process clause of the Fourteenth Amendment by subjecting the company to the alternative of accepting less than value for the plant or having it ruined by construction and operation of the municipal plant.

The equal protection provision of the Fourteenth Amendment does not prevent a city from adopting a scheme of municipal ownership as to a single public utility, and a charter provision which prohibits franchises for that purpose does not violate the equal protection provision of the Fourteenth Amendment.

A provision in regard to the acquisition of a municipal water plant *held* in this case not to be a revision *in extenso* of the city charter but only an amendment thereto; and also *held* that none of the objections to the adoption of the amendment to the charter of the City of Denver providing for erection of a municipal water plant are tenable.

187 Fed. Rep. 890, reversed.

THE facts, which involve various elements of a controversy between the City of Denver, Colorado, the Denver Union Water Company and the New York Trust Company, trustee of bonds of the said company, and the construction and validity of the contracts and ordinances and statutes relating to the water supply of Denver, are stated in the opinion.

Mr. William H. Bryant and *Mr. Charles W. Waterman*, with whom *Mr. William P. Malburn* and

Mr. William A. Jackson were on the brief, for petitioners.[1]

Mr. Henry McAllister, Jr., with whom *Mr. Joel F. Vaile*, *Mr. William N. Vaile* and *Mr. J. Markham Marshall* were on the brief, for the New York Trust Company, respondent in No. 642.[1]

Mr. Gerald Hughes and *Mr. Clayton C. Dorsey* for the Denver Union Water Company, respondent in No. 643.[1]

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This suit presents a threefold controversy, to which the New York Trust Company (a New York corporation), the City and County of Denver (a municipal corportation in Colorado), and the Denver Union Water Company (a Colorado corporation) are the principal parties. They are respectively the successors of similar corporations whose acts, together with their own, created the situation out of which the controversy arose, but it will be convenient to treat them as if they were the original participants in all those acts. Although formerly controlled by a charter enacted by the legislature of the State, the city, in pursuance of an amendment of the state constitution, came in 1904 to be governed by a charter framed and adopted by the people of the city and over which they possessed an exclusive power of alteration and amendment. Laws 1889, p. 124; Laws 1893, p. 131; Const., Art. 20, Rev. Stat. 1908, p. 55.

By the charter from the state legislature (Laws 1889) the city was given power (§ 9) "to construct or purchase

[1] The briefs in this case were very elaborate and exhaustive, several hundred authorities bearing on the issues involved are collated and reviewed. This renders it impossible to make abstracts of them.

water works for the use of the city" and generally to do whatever was "needful . . . in order to supply the city with water for fire, irrigating, domestic and other purposes," subject to the qualification (§ 12) that "*all franchises or privileges*" granted by the city should "*be limited to twenty years from the granting of the same.*" April 10, 1890, while that charter was in force, the city, by an ordinance designated as No. 44 and duly accepted by the water company, granted to the latter, its successors and assigns, the right and privilege of laying down, continuing and maintaining pipes and other apparatus for the conveyance and distribution of water along and through designated streets, alleys and public places of the city, "*to such extent as the city may lawfully grant the same*" and subject to termination as therein provided. The ordinance contained various provisions regulatory of the right and privilege so granted, the duty of the water company to supply water for private use and for fire and other public purposes, the rates to be charged private users, and the hydrant rentals to be paid by the city. There were also the following sections:

"SEC. 11. At the expiration of *the period of twenty years* from and after the date of the passage and approval of the ordinance, *in case the city shall then elect so to do*, the said works *may be purchased* by the said city, and in case the parties can not agree, after such election, upon the price to be paid by the city for the water works of the said company, its successors and assigns, then their fair cash value shall be determined by arbitration, by five disinterested persons, none of whom shall be residents of Denver, two of them to be chosen by the city, two by the company, and the fifth by the four first chosen, and in case of failure on the part of the company to name arbitrators for the period of thirty days after the city shall have named arbitrators and notified the company so to do, the city may apply to any court having equity

jurisdiction in the county in which the city of Denver shall then be situated for the appointment of two persons of the qualifications aforesaid as such arbitrators, and the court may thereupon appoint two persons, who shall act with the same force and effect as if appointed by the company, and the decision of a majority of said board shall be final and binding upon both parties, and upon the payment, or tender of payment, by said city the said company shall convey to said city all of its property, real or personal, easements, rights and privileges, and thereafter all franchises, rights and privileges which have been at any time theretofore granted said company, its successors or assigns, and which it may then possess, shall cease and be at an end.

"SEC. 12. At the expiration of the said *period of twenty years* the said city *may, at its election, renew the contracts hereby made*, by ordinance to that effect, for a like period of twenty years, but at a price for hydrant rental 10 per cent. less than mentioned in section 10 hereof, for the period remaining after the ten years after May 1st, 1891, and for successive periods of twenty years at the price last aforesaid, as often and as long as the city *may choose*. This section is conditioned, however, upon the full performance by the city of the provisions of section 2 hereof.

"SEC. 19. This ordinance, when the same shall be in writing accepted by The Denver Water Company, becomes a contract between the city of Denver and the said The Denver Water Company, its successors and assigns, and the same shall as to every provision herein contained as fully bind and inure to the benefit of the successors and assigns of the said The Denver Water Company as to the said company. And it is expressly understood that by the acceptance of this ordinance the said The Denver Water Company loses no rights in regard to the occupation of the streets, alleys and public places, or as to the rights of any other person or persons thereto which it now

possesses, but the same are hereby recognized and confirmed and are to be deemed independent of and not merged in any grant in this ordinance elsewhere contained.

"SEC. 20. All mains, pipes, valves and other apparatus now owned by said The Denver Water Company, and composing its plant, and all such mains, pipes, valves, hydrants and other apparatus as said The Denver Water Company, its successors or assigns, shall hereafter lay down or set in or upon any of the streets, alleys or other public places within said city shall be and remain the sole and absolute property of said The Denver Water Company, its successors and assigns, and the said The Denver Water Company, its successors or assigns, shall forever be considered and entitled to be in possession thereof, except in case of purchase by said city under the terms of this ordinance, or some agreement between said city and said company, its successors or assigns, when all rights of whatsoever nature of said company, its successors or assigns, in and to the subject-matter hereof shall vest in said city.

"SEC. 21. While the consideration for the respective agreements of the city and the company are upon each side the several agreements of the other, all of the several grants, contracts and agreements in this ordinance contained are to be deemed independent agreements with the same force and effect as if each section of this ordinance was contained in a separate ordinance by itself."

By a written contract made in 1870 the city had granted to the water company a sole and exclusive right to lay pipes within the city for use in the distribution and sale of water, but that contract had been expressly annulled by another made in 1874, whereby the city granted to the company a right of like character expressly limited to a period of seventeen years from May 1 of that year. What was said in §§ 19 and 20 of the ordinance of 1890 about rights and a water plant already possessed by the water

company had reference to the rights then held and the plant then operated under the 17-year contract, which was within a year of expiration, and to some other rights mentioned in the record and equally without material bearing here.

By an amendment of the state constitution in 1902—it being the amendment under which the home-rule charter was framed and adopted two years later—the city was empowered to construct, purchase, maintain and operate water works for the use of itself and its inhabitants, and to issue bonds, after an approving vote of the taxpaying electors, in any amount necessary to carry out that power; and this amendment declared that "No franchise relating to any street, alley, or public place of the said city and county shall be granted except upon the vote of the qualified taxpaying electors." Article XX, §§ 1 and 4.

October 2, 1907, about two and one-half years before the expiration of the 20-year period specified in the ordinance of 1890, the city adopted and the water company accepted an ordinance designated as No. 163, providing, first, for an immediate appraisement, by appraisers selected conformably to § 11 of the ordinance of 1890, of the fair cash value of all the property of the water company and its auxiliary companies then used in supplying the city and its inhabitants with water; second, for the immediate fixing by the appraisers of a schedule of reasonable rates for water for private and public purposes for a further period of 20 years; third, that the decision of any three of the appraisers should be binding as to the questions submitted to them for determination; fourth, for the submission to the electors of the city, at a single special election, of the questions (a) whether the city should purchase the property at the value fixed by such appraisement, and (b) whether a new contract or franchise should be granted to the water company for a further period of 20 years on the basis of the rates fixed by the

appraisers; fifth, for carrying into effect either of said propositions if approved by the electors; and, sixth, that if the electors should "*refuse to accept either proposition*" no prejudice should result to the rights of either party under the ordinance of 1890, but such rights should remain as if the ordinance of 1907 had not been adopted or accepted. That ordinance recited that the water company would agree with the city to put in new temporary rates to be charged private consumers of water after November 1, 1907, for the remainder of the term specified in the then existing contract or ordinance of 1890, "in the event that the city . . . shall *not* at said election . . . *determine to purchase said plant or to extend or renew said contract* for a further period of twenty years."

March 20, 1909, the appraisers, acting under the ordinance of 1907, appraised the property at $14,400,000, but they failed to fix the schedule of rates which was to be a part of the proposition to renew the existing contract or franchise of 1890 for a further period of 20 years, and this failure operated, without fault on the part of the city or the water company, to prevent any further action under the ordinance of 1907, which called for the submission of both propositions at a single special election.

May 17, 1910, over a month after the expiration of the 20-year period specified in the ordinance of 1890, the people of the city amended its charter by adding a new section, known as § 264a. Briefly described, this amendment created a public utilities commission, named its first members and transferred to it the authority theretofore given to the board of public works as to all public utilities; particularly invested it with large powers in respect of the construction, acquisition, maintenance and operation of a water plant; declared that the city should never exercise any option to purchase such a plant, or to renew any contract with reference thereto, otherwise than through an approving vote of the qualified electors;

authorized the issuance of bonds in the sum of $8,000,000, if sanctioned by a vote of the taxpaying electors, to provide a municipal water plant; provided for the use, subject to the approving vote of such electors, of $7,000,000 of these bonds in the purchase of the plant of the water company, if it should, on or before July 1, 1910, elect to accept that sum, and for the use of the remaining $1,000,000 of bonds in improving, repairing and adding to the plant; and directed that, if the water company did not so elect, a special election should be held on the first Tuesday in September, 1910, to enable the taxpaying electors to vote upon the question of issuing the $8,000,000 of bonds for the purpose of constructing and putting into operation a municipal plant.

The water company did not elect to accept the $7,000,000 for its plant, and the city officers took the necessary preliminary steps to hold the special election called for by the charter amendment.

There was at no time an election by the city to purchase the water company's plant pursuant to the option reserved in § 11 of the ordinance of 1890, unless the ordinance of 1907, the charter amendment of 1910, or the failure to renew the contract or franchise pursuant to the option reserved in § 12 operated as such an election; and there was no election by the city to renew the contract or franchise pursuant to the latter option, unless the failure to exercise the other one was such an election.

The positions of the city and the water company in that regard came to be as follows: The city was insisting that the contract or franchise granted by the ordinance of 1890 was limited to 20 years in duration by the legislative charter in force when the ordinance was adopted; that the options reserved in §§ 11 and 12 of that ordinance were not alternative in the sense that one or the other must be exercised, but were independent in the sense that there was no obligation to exercise either; that neither

was exercised, and therefore that, the 20-year limitation having expired, the contract or franchise was at an end. The water company, on the other hand, although not conceding the 20-year limitation, was insisting that the options were alternative in that the city was bound to exercise one or the other, that it had elected not to purchase the company's plant, and that in so doing it necessarily had elected and become obligated to renew the contract or franchise for another period of 20 years.

In this situation the trust company, being the trustee in a subsisting mortgage given in 1894 by the water company upon all of its property, including franchises, contracts, rentals and the right to receive the purchase price in the event of a purchase by the city, brought this suit against the city, certain of the city officers, the water company, and the South Platte Canal and Reservoir Company, a subsidiary of the latter holding the title to an important part of its property, to obtain a decree which should, among other things, declare that the city had elected and become obligated to purchase the property, direct a specific performance of that obligation and of the correlative obligation of the water company to sell, compel the payment of the purchase price to the trust company under the mortgage, and restrain and enjoin the city and its officers from meanwhile constructing a new municipal water plant, as also from taking any steps towards issuing bonds for that purpose. A cross-bill against the other defendants and the trust company was interposed by the water company, wherein it prayed, among other things, that its right to a renewed contract or franchise for another term of 20 years be established and that the city and its officers be directed to take such steps as might be necessary to effect the renewal. Upon applications submitted upon the bill, cross-bill and divers proofs the Circuit Court granted interlocutory orders, upon both bills, temporarily enjoining the city and its

officers from taking any steps towards the construction of a municipal water plant or issuing bonds for that purpose, and, in the instance of the cross-bill, from interfering with the water company in the exercise and enjoyment of the rights asserted by it under the contract or franchise of 1890. Appeals were taken to the Circuit Court of Appeals, where the interlocutory orders were affirmed, 187 Fed. Rep. 890, and the case is now here upon certiorari.

The exceptional power to review, upon certiorari, a decision of a Circuit Court of Appeals rendered on an appeal from an interlocutory order is intended to be and is sparingly exercised. But there can be no doubt that the power exists where no appeal would lie from a final decree of that court, as is the case where the suit is one in which the jurisdiction of the court of first instance depended entirely upon diverse citizenship. Judicial Code, §§ 128, 240; *American Construction Co.* v. *Jacksonville Co.*, 148 U. S. 372, 385; *Forsyth* v. *Hammond*, 166 U. S. 506. We think this is such a suit. The bill states that the trust company is a citizen of New York, that all the defendants are citizens of Colorado, and that "this is a controversy wholly between citizens of different States." True, it also alleges that the suit is one arising under the Constitution of the United States and attempts to support this general allegation by others referring to supposed and conjectured infractions of the contract and due process of law clauses of that instrument; but, when the true nature of the trust company's cause of action is considered, it is apparent that these allegations must be disregarded—some because they are without color of merit, and others because they are not a necessary part of the statement of that cause of action, but are in anticipation of defenses which it is thought the defendants may possibly interpose. See *Colorado Central Mining Co.* v. *Turck*, 150 U. S. 138, 143; *Tennessee* v. *Union & Planters' Bank*, 152 U. S. 454, 459; *New Orleans* v. *Benjamin*, 153 U. S. 411, 424; *Boston*

&c. Mining Co. v. *Montana Ore Co.*, 188 U. S. 632, 638, 639; *Defiance Water Co.* v. *Defiance*, 191 U. S. 184, 191; *Newburyport Water Co.* v. *Newburyport*, 193 U. S. 561, 576; *Devine* v. *Los Angeles*, 202 U. S. 313, 333; *Shulthis* v. *McDougal*, 225 U. S. 561, 569.

The gravamen of the trust company's cause of action is that the ordinance of 1890 restricted the city to a choice between two options, one to purchase the water plant and the other to renew the contract or franchise; that by the ordinance of 1907, and again by the charter amendment of 1910, the city made a binding election to purchase, which it now disregards and refuses to carry into effect; that the city is authorized by law to acquire a water plant by purchase or to construct one of its own, but not to do both; that, having elected and become obligated to purchase the existing plant, it is without authority to construct a new one; that the water company erroneously maintains that it is entitled to a renewal of the existing contract or franchise, and wrongfully refuses to insist upon a purchase by the city; and that in this situation the trust company is entitled, in virtue of its mortgage, to enforce the city's election and obligation to purchase and meanwhile to have the city enjoined from placing an obstacle in the way of the purchase by constructing a new plant. It is not asserted that the contract or franchise of 1890 was exclusive or contained any stipulation restraining the city from constructing and operating a plant of its own, or that the trust company is a property holder or taxpayer of the city; and so, the company can have no legal concern with what is done by the city in the premises, if only it performs its alleged obligation to purchase. It hardly needs statement that a suit to enforce such a cause of action is not one arising under the Constitution of the United States. "As has been stated, the rule is a reasonable and just one that the complainant in the first instance shall be confined to a statement of his cause of

action, leaving to the defendant to set up in his answer what his defense is, and, if anything more than a denial of plaintiff's cause of action, imposing upon the defendant the burden of proving such defense." *Joy* v. *St. Louis*, 201 U. S. 332, 341.

But if we go beyond the trust company's statement of its cause of action and consider the attitude which it attributes to the city the result is still the same, for the bill expressly shows that the city puts its refusal to purchase upon the ground that it was not restricted by the ordinance of 1890 to a choice between the two options but left free to exercise either or neither; that it did not, by the ordinance of 1907, the charter amendment of 1910, or otherwise, exercise the option to purchase; and therefore that it has incurred no obligation in that regard. In other words, the bill discloses that the city's position is, that the trust company's claim is refuted by the very ordinances and charter amendment which are relied upon to sustain it. Of course, if this were the city's defense the controversy would be solved by merely ascertaining the proper construction of the ordinances and charter amendment, and there would be no occasion to consider the Constitution of the United States at all.

That the cross-bill may be broader than the original and seek relief on a Federal ground does not affect the question of the Circuit Court's jurisdiction, for a cross-bill is a mere auxiliary or dependency of the original and is entertained and disposed of in the exercise of the jurisdiction invoked by the latter. *Ayres* v. *Carver*, 17 How. 591, 595; *Ex parte Railroad*, 95 U. S. 221, 225; *Rouse* v. *Letcher*, 156 U. S. 47, 50; *Shulthis* v. *McDougal*, 225 U. S. 561, 568.

It follows that the jurisdiction of the Circuit Court depended entirely upon diverse citizenship, and therefore that the suit is one in which no appeal would lie from a final decree of the Circuit Court of Appeals.

We come, then, to the objections made to the orders granting the temporary injunctions, and as these objections are addressed, not merely to the injunctions, but to the merits of both the bill and the cross-bill, it is well to observe at the outset that our power of review, like that of the Circuit Court of Appeals, is not confined to the act of granting the injunctions, but extends as well to determining whether there is any insuperable objection, in point of jurisdiction or merits, to the maintenance of either bill, and, if so, to directing a final decree dismissing it. *Smith* v. *Vulcan Iron Works*, 165 U. S. 518, 525; *Mast, Foos & Co.* v. *Stover Manufacturing Co.*, 177 U. S. 485, 494; *Harriman* v. *Northern Securities Co.*, 197 U. S. 244, 287; *United States Fidelity & Guaranty Co.* v. *Bray*, 225 U. S. 205, 214.

Whether the trust company is merely an assignee seeking to recover the contents of a chose in action, and whether its interest in the litigation is so far identical and in accord with that of the water company as to require that they be aligned on the same side, are questions upon which the record is not entirely clear, and it therefore will be assumed, as is expressly or impliedly affirmed by both companies, that these questions should be resolved favorably to the jurisdiction of the Circuit Court. See act August 13, 1888, 25 Stat. 433, c. 866, § 1; *Dawson* v. *Columbia Trust Co.*, 197 U. S. 178, 181; *Shoecraft* v. *Bloxam*, 124 U. S. 730, 735.

What is the proper construction of the ordinance of 1890? Was the contract or franchise granted by it limited to 20 years? Did the city obligate itself thereby to purchase the plant or to renew the contract or franchise at the end of that period, or did it merely reserve the privilege of doing one or the other or neither, as to it should seem best at the time? These are the questions which must first be considered. It is not asserted that the ordinance granted an exclusive franchise or restrained the city from con-

structing a plant of its own, nor would such an assertion, if made, have any support in the terms of the ordinance. But it is said that no time was fixed for the duration of the franchise. This may be taken as true so far as the actual terms of the ordinance are concerned, although it ought not to be overlooked that it contained some recognition of a limitation elsewhere imposed, for the granting clause was qualified by the words "to such extent as the city may lawfully grant the same," and §§ 11 and 12, before set forth, proceeded as if the period would be 20 years. But the term of the franchise was not left undefined or in doubt, for the charter of the city explicitly declared that "all franchises and privileges" granted by it should "be limited to twenty years from the granting of the same," and the context made it perfectly plain that this limitation was intended to apply to rights to occupy and use the streets, alleys and public places of the city such as were granted in this instance. The limitation became a part of the ordinance quite as much as if written into it. No doubt it was intended that the franchise should endure for the full period of 20 years. The qualifying words in the granting clause and the reference to that period in §§ 11 and 12 leave no doubt of this, but it was not intended, because it could not be, that it should endure longer. True, some of the provisions in §§ 19 and 20, if taken by themselves, might possibly make for a different conclusion, but they must be read with other parts of the ordinance, and all must be read with and subordinated to the charter limitation.

The principal controversy is over the purpose and effect of §§ 11 and 12 of that ordinance. As before shown, § 11 states that at the expiration of the period of 20 years the plant "may be purchased" by the city, if it "shall then elect so to do," and § 12 says that at the expiration of that period, the city "may, at its election, renew the contract hereby made," with a reduction of 10 per cent. in the

rental for hydrants. The word "contract" is used here, as elsewhere in the ordinance, as inclusive of the franchise to occupy and use the streets. Each section reserves or gives to the city a pure option. Under one it may purchase the plant, if it so elects, and under the other it may, at its election, renew the contract; but neither imposes any duty or obligation upon it, unless it exercises the privilege therein given. Such is the natural import of the terms employed, and they are plain and unequivocal. But it is said that the presence of the two options imposes on the city the duty of accepting one. Indeed, it is said in support of the bill that a failure to renew is an election to purchase, and in support of the cross-bill that a failure to purchase is an election to renew. We are clearly of opinion that these claims are ill-founded. In the absence of some stipulations to that end the city would be under no obligation to purchase or to renew, nor would it be entitled to do either. There is no stipulation purporting to impose such an obligation. All that is done is to reserve or give to the city the right to purchase or to renew, if it so elects. In other words, it is given a privilege to do either, but with no obligation to exercise it. Its situation is not unlike that of one who has sold real property, with a reserved privilege of repurchasing it or of taking a lease upon it after the expiration of a term of years. Although entitled to avail himself of either phase of the privilege, he is free to reject both.

As suggesting that the purpose of §§ 11 and 12 is different from what we hold it to be, we are referred to an ordinance of December 15, 1894, leasing to the water company a water plant formerly owned by the town of South Denver and acquired by the city through the annexation of that town. At most this ordinance has only an indirect bearing here, and the inferences drawn from it by counsel, even if justified, are quite inadequate to overcome the plain and unequivocal terms of those sections.

Whether, consistently with the powers conferred and the limitations imposed by the city charter then in force, the city could have bound itself, when the ordinance of 1890 was adopted, to purchase the plant or to renew the franchise at the expiration of the 20-year period is a question extensively discussed by counsel; but as we are fully persuaded that there was no attempt or purpose to create such an obligation by that ordinance, the point may be passed without further notice.

The trust company relies upon the ordinance of 1907 as showing an election by the city to purchase, or at least to purchase if the franchise was not renewed. That ordinance, we have seen, provided for an appraisement of the water company's property in advance of the expiration of the existing franchise, for the fixing of a reasonable schedule of rates to be charged during a further period of 20 years, and for submitting to the electors of the city, at a single special election, the questions (a) whether the city should purchase at the appraisement, and (b) whether a new franchise should be granted to the water company for a further period of 20 years on the basis of the rates so fixed. The appraisers chosen for the purpose made an appraisement but failed to fix the schedule of rates, and so, without any fault of the city or the water company, nothing further was done under that ordinance. It did not purport to make an election to purchase or to renew, either conditionally or otherwise. On the contrary, it affirmatively contemplated that the election, if any, was to be by the electors of the city, and that they might reject both propositions. Besides, Article 20, § 4, of the state constitution then in force provided that no franchise relating to the streets of the city should be granted except upon a vote of the electors, and Article 9 of the city charter then in force made a like vote a prerequisite to the acquisition by the city of any public utility. So, had the council attempted by the ordinance of 1907 to make an

election to purchase or to renew, the attempt would have gone for nothing. No doubt, the difficulty arising from the failure to fix a schedule of rates could have been adjusted between the city and the water company and the two propositions (the second in a modified form) submitted to the electors at an election called through a new ordinance. But this was not done, possibly because, as the record discloses, both parties were dissatisfied with the appraisement, the city claiming that it proceeded upon erroneous principles and was grossly excessive and the water company that it was inadequate and insufficient. But, however this may have been, it is plain that the ordinance of 1907 was not an election to purchase, either conditionally or at all.

The trust company also relies upon the charter amendment of May 17, 1910, § 264a, as showing an election to purchase under the option reserved in the ordinance of 1890. The amendment did not contemplate a purchase in accordance with that option, but independently of it and upon altogether different terms. Instead, therefore, of being an exercise of the option, it was a rejection of it. *Minneapolis & St. Louis Railway Co.* v. *Columbus Rolling Mill*, 119 U. S. 149, 151.

The Circuit Court of Appeals, having stated the conflicting claims of the trust company and the water company, the one that the city had elected to purchase, and the other that it had elected to renew, said: "The facts are stated upon which these claims are based, and it does not appear to us that the city has done either." With that conclusion we fully agree. In so far, then, as the bill and cross-bill are founded upon the contractual relations claimed to have arisen out of the ordinance of 1890, they must fail, and as the bill has no other basis it manifestly cannot be maintained.

As an additional ground for enjoining the issuing of bonds and the construction of a municipal water plant

under the charter amendment, § 264a, the cross-bill, after stating that the water company is a large property holder and taxpayer of the city and must share in the burdens which will be placed upon all its property holders and taxpayers by issuing the bonds and constructing the municipal plant, challenges the validity of the amendment, and therefore the authority of the city to carry it into effect. It remains to consider the objections upon which this challenge is rested.

Two objections named in the cross-bill are, that Article 20 of the state constitution (adopted as an amendment in 1902), upon which the charter amendment is based, (a) is repugnant to Article IV, § 4 of the Constitution of the United States guaranteeing to the State a republican form of government, in that it takes from the state legislature and vests directly in the people of the city legislative power over all subjects of purely municipal concern, and (b) is repugnant to § 2 of Article 2, § 1 of Article 5, and § 2 of Article 19 of the state constitution. These objections are not now insisted upon, the first doubtless because it is deemed sufficiently covered and disposed of, as undoubtedly it is, by our recent decision in *Pacific States Telephone & Telegraph Co.* v. *Oregon*, 223 U. S. 118, and the second because it appears to be foreclosed by decisions of the Supreme Court of the State, in *People* v. *Sours*, 31 Colorado, 369, and other cases. Both may therefore be passed without further notice.

The next objection invokes the due process of law clause of the Fourteenth Amendment to the Constitution of the United States, and is, that the charter amendment subjects the water company to the alternative of accepting an inadequate price for its plant or of having its value ruinously impaired by the construction and operation of a municipal plant, and that this amounts to an unlawful deprivation of property. The objection is faulty in that it fails to recognize the real situation to which the

charter amendment applies. The water company, although the undoubted owner of the physical property constituting its plant, is without a franchise to maintain and operate it through the streets of the city, the prior franchise having expired; and the city not only is under no legal obligation to renew the franchise or to purchase the plant, but is free to construct and operate a plant of its own. How then, can it be said that the proposal, expressed in the amendment, to purchase the company's plant at $7,000,000 and to devote $1,000,000 more to its betterment, or else to construct a new one at a cost of $8,000,000, involves an unlawful deprivation of property or any right? See *Madera Water Works* v. *Madera*, 228 U. S. 454; *Detroit United Railway* v. *Detroit*, *ante*, p. 39. Whether $7,000,000 is an adequate price for the company's plant, and whether its value will be ruinously impaired by the construction of a municipal plant, are beside the question. Being under no obligation to purchase, the city is free to name its own terms, and the water company is likewise free to accept or reject them. The latter is under no compulsion other than such as inheres in the nature of its property or arises from a proper regard for its own interests. That the city, mindful of its interests, offered $7,000,000 for the water company's plant, when it could have proceeded to the construction of a new plant of its own, without making any offer to the company, affords no ground for complaint by the latter. *Newburyport Water Co.* v. *Newburyport*, 193 U. S. 561, 577.

Another objection invokes the equal protection clause of the Fourteenth Amendment and is, that the charter amendment singles out and deals with the subject of a water supply and with the plant of the water company, leaving all other public utilities to be dealt with under general charter provisions, and also cuts off all opportunity to obtain future franchises to occupy and use the streets

for the purpose of supplying water to the city and its inhabitants, while leaving full opportunity to obtain such franchises for other purposes, such as supplying light, heat, power, transportation, or telephone service. There is no merit in this objection. The equal protection clause is directed only against arbitrary discrimination, that is, such as is without any reasonable basis. *Lindsley* v. *Natural Carbonic Acid Gas Co.*, 220 U. S. 61, 78. It does not prevent a city from applying the scheme of municipal ownership and maintenance to one public utility without applying it to all; nor does it prevent a city, owning and maintaining a municipal water plant, from refusing to grant franchises which will bring privately owned plants into competition with its own. There is nothing unequal in this in the sense of that clause. And if it was essential that there be a reasonable basis for dealing specially and directly, as was done, with the question of purchasing the company's plant, the situation before recited shows that such a basis was not wanting.

Article 20 of the state constitution, under which the present home-rule charter was adopted, while investing the people of the city (§ 4) with "exclusive power in the making, altering, revising, or amending their charter," makes a distinction (§ 5) between the modes of amending it and of revising it *in extenso* or making a new one, the difference being that an amendment may be initiated by petition and directly voted upon and adopted by the electors, while a revised or new charter requires the intervention of a charter convention. Relying upon this, it is objected that § 264a, now under consideration, is not an amendment but partakes of the nature of a revised or new charter, and is invalid because, as is the fact, it was not framed and approved by a charter convention before being submitted to the electors. The point cannot be sustained. The section is in form and in substance a mere amendment. It does not alter the form of the city government or make

extensive changes in the existing charter, but is confined to matters pertaining to public utilities, more especially the acquisition, maintenance and operation of a municipal water plant. In the briefs some reference is made to *Speer* v. *People*, 52 Colorado, 325, where the Supreme Court of the State recently had before it a proposed amendment radically and extensively changing the form of the city government. The opinions rendered in the case disclose some differences of opinion upon the question whether what was proposed could be regarded as a mere amendment, but the question was not decided and nothing was said in the opinions that tends to sustain the objection now made to § 264a.

Another objection urged against that section is, that it is in conflict with Article 20, § 4, of the state constitution in that, while that article provides that the question of granting a desired franchise shall be submitted to the electors upon the deposit with the city treasurer of the expense of the submission, § 264a prevents the granting of any franchise for the purpose of furnishing a supply of water. Assuming that § 264a does do this, it is done as part of the plan of establishing and maintaining a municipal water plant expressly authorized by Article 20, § 1. Besides, the provision in Article 20, § 4, which is relied upon, is a subordinate part of a limitation or restriction to the effect that no franchise to occupy or use the streets of the city shall be granted except upon an approving vote of the electors, and is evidently intended to be merely regulatory of the payment of the expense of taking the vote, and not to make such payment the only test of the right to have the vote taken.

Finally, it is objected that the submission and adoption of § 264a were in contravention of the existing charter, (a) because the section deals with several independent and unrelated subjects, (b) because it designates the first members of the public utilities commission, instead of

leaving them to be elected in accordance with the general provision in § 178 of the charter, and (c) because it prescribes a different mode of acquiring a municipal water plant than that provided in Article 9 of the charter. In disposing of a preceding objection, we have held that § 264a was merely an amendment of the charter, and that the mode of its submission and adoption was in accord with the applicable restrictions of the state constitution. No additional restrictions were prescribed by the charter, its only provision upon the subject being (§ 20), "Any measure, charter amendment, or proposal for a charter convention, may be submitted to a vote of the qualified electors in the manner provided by the constitution." In passing upon the preceding objection, therefore, we have passed upon the first branch of the one just stated; but it may be added that we think all the provisions of the amendment have such a relation to the principal subject, namely, the public utilities of the city, as to permit their inclusion in a single amendment. Of the other two branches of this objection it is enough to say that the amendment supersedes *pro tanto* the original provisions of the charter with which it is not in accord. The purpose in adopting it was to introduce something new, to make a change in existing provisions, and being adopted conformably to the constitutional and charter requirements, the new or changed provisions became at once a part of the charter, thereby supplanting or modifying the original provisions to the extent of any conflict.

Having now considered all the claims advanced in support of the cross-bill and finding, as we do, that it has no support in any of them, it follows that, like the original bill, it cannot be maintained. The interlocutory decrees of the Circuit Court of Appeals and the Circuit Court are accordingly reversed, and the case is remanded with a direction to dismiss both bills on the merits.

Reversed.